

Before the  
COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
Washington, D.C.

In the Matter of

Mechanical and Digital Phonorecord Delivery Rate  
Adjustment Proceeding

Docket No. 2006-3 CRB DPRA

**THE WRITTEN DIRECT STATEMENT, WITNESS STATEMENTS & EXHIBITS OF  
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., THE SONGWRITERS  
GUILD OF AMERICA, AND THE NASHVILLE SONGWRITERS ASSOCIATION  
INTERNATIONAL**

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**VOLUME III**

Filed on April 10, 2007

**EXHIBIT CO 0030**

**Execution Copy**

**Digital Music Subscription Service Agreement**

This agreement (the "Agreement"), dated as of August 6, 2004 ("Effective Date"), is made by and between **Redacted** ("Licensee") and The Harry Fox Agency, Inc. ("HFA"), (the "Parties").

WHEREAS, Licensee desires to offer to consumers certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works available to consumers by licensing such services;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and the parties by this Agreement seek to provide for greater clarity concerning the legal status of Covered Services (as defined below);

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to Licensee and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of unresolved legal issues and to facilitate the expeditious launch of digital music services, the Parties have reached this Agreement (which HFA represents reflects HFA's standard terms with respect to the concepts covered herein) with respect to terms pursuant to which Licensee may obtain licenses to make On-Demand Streams and Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(o)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Covered Services.** When Licensee seeks to use a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that are the subject matter of this Agreement in connection with the operation of its Covered Services, it may obtain through HFA on behalf of such HFA publisher-principal a mechanical license ("License") to make On-Demand Streams and/or Limited Downloads of the work through Covered Services, through to the end user, including by making server and related reproductions of the work used in the operation of Covered Services.

**Execution Copy**

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective  
Date.

\_\_\_\_\_  
Jacqueline C. Charlesworth  
SVP & General Counsel  
The Harry Fox Agency, Inc.

Redacted



Execution Copy

## EXHIBIT C

## Data Access and Use Agreement

This Data Access and Use Agreement ("Agreement") is entered into as of August 6, 2004, by and between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and Redacted ("Recipient").

WHEREAS, Recipient (also referred to at times herein as "Licensee") and HFA have entered, or expect to enter, into that certain license agreement, dated as of August 6, 2004 (the "License Agreement"), pursuant to which HFA has granted, or will grant, limited rights to certain copyrighted musical compositions (each, a "Musical Work") in connection with the operation of Licensee's digital music subscription service; and

WHEREAS, Recipient seeks to access and use certain HFA Confidential Information (defined in Section 1 below) as necessary to obtain and administer the licenses issued under the License Agreement (each, a "License"), and as otherwise may be necessary to comply with Licensee's obligations under the License Agreement (collectively, the "Purpose"), and HFA has agreed to allow Recipient such limited access to and use of the HFA Confidential Information solely as necessary to accomplish the Purpose;

NOW THEREFORE, in consideration of the premises of and the mutual promises, covenants and agreements contained in this Agreement, HFA and Recipient agree as follows:

1. HFA Confidential Information.

"HFA Confidential Information" means any and all information and material disclosed by HFA to Recipient or obtained by Recipient from HFA (whether in writing, or in oral, graphic electronic or any other form) that is proprietary and/or is intended by HFA to remain confidential relating to HFA's business and its databases, products, services, business strategies, capabilities or business affairs, including without limitation, all data and information related to the Musical Works and ownership thereof and/or HFA's publisher-principals.

2. Non-Disclosure and Limited Use.

Recipient covenants (a) to hold all HFA Confidential Information in strict confidence, (b) that it shall disclose (or permit access to) the HFA Confidential Information solely to (or by) its employees, if any, who need to know or access such HFA Confidential Information to accomplish the Purpose, and who are bound by nondisclosure and use restrictions and obligations comparable to and at least as restrictive to those set forth herein, and (c) that it shall not disclose to any third party, including any agent, contractor, consultant or other party, or permit any such party to access, the HFA Confidential Information, unless and until such party has entered into a written agreement with HFA in form and substance of this Agreement governing the nondisclosure and use of the HFA Confidential Information. Recipient further covenants that it shall (y) use HFA Confidential Information solely as necessary to accomplish the Purpose, and (z) not extract, aggregate, derive or copy any HFA Confidential Information, whether by bulk transfer or through individual data query and response, for use or incorporation in any database, unless the sole purpose of such use or incorporation is to accomplish the Purpose. Recipient agrees to notify HFA immediately upon obtaining any information regarding unauthorized disclosure or access to the HFA Confidential Information.

Notwithstanding the disclosure and use restrictions in this Section 2, Recipient may disclose HFA Confidential Information (i) that is independently derived or acquired from a party not subject to a duty of confidentiality to HFA, or (ii) to the extent required to respond to the request of a court of competent jurisdiction, provided that upon receiving any such request and to the extent that it may do so without violating any law, Recipient prior to such disclosure advises HFA of such request in order that HFA may take such action as it deems appropriate to protect the HFA Confidential Information. During the Term (defined in Section 5 below) and for a period

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of three (3) years following the termination or expiration of this Agreement, Recipient agrees to permit HFA to inspect, on a semi-annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Confidential Information is (or was) used in Recipient's facilities, if any, and to furnish whatever assistance is reasonably necessary to permit HFA to determine whether Recipient, including its employees, agents, subcontractors, independent contractors, consultants or other parties, if any, are in compliance with this Agreement.

**3. Ownership.**

Recipient acknowledges and agrees that all right, title and interest in and to the HFA Confidential Information (including all copies, extracts and portions thereof) is and shall remain the sole property of HFA. Recipient does not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights under this Agreement or any disclosure or access hereunder, except the limited right to use such HFA Confidential Information in strict accordance with the express provisions of this Agreement. All rights relating to the HFA Confidential Information that are not expressly granted hereunder to Recipient are reserved and retained by HFA.

**4. No Warranty; Limitation of Liability.**

EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE HFA CONFIDENTIAL INFORMATION OR ANY USE THEREOF, AND THE HFA CONFIDENTIAL INFORMATION IS PROVIDED ON AN "AS IS" BASIS. EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA HEREBY EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES, INCLUDING, BUT NOT LIMITED TO, CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA CONFIDENTIAL INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA CONFIDENTIAL INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT, EVEN IF HFA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

**5. Term; Termination.**

This Agreement will continue for the term of the License Agreement (including any agreed extensions thereof) (the "Term"), unless otherwise terminated by HFA in accordance herewith. Without otherwise limiting any right HFA may have to terminate the License Agreement and/or that certain Side Letter dated as of August 6, 2004, or any other right HFA may have under this Agreement, HFA may terminate this Agreement at any time upon written notice to Licensee based upon a material breach of Licensee's obligations under Section 2 of this Exhibit C, in which case HFA shall have no further obligations to disclose to or permit access by Recipient to any HFA Confidential Information; and provided, however, that each party's rights and obligations shall otherwise survive the termination or expiration of this Agreement.

**6. Purging of HFA Confidential Information.**

Promptly following any expiration or termination of this Agreement, Recipient shall purge and destroy any and all records and copies of HFA Confidential Information from any Recipient databases and other systems under Recipient's direct or indirect control, and any other media on which any HFA Confidential Information may have been provided, together with all copies thereof, whether in printed or machine readable form; provided, however, that Recipient may retain any records and copies of HFA Confidential Information solely to the

Execution Copy

extent and for the period necessary to permit Licensee to fulfill any further obligations under the License Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

7. **Assistance of Counsel.**

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

8. **Specific Performance.**

Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

9. **Miscellaneous.**

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By: \_\_\_\_\_  
Name:  
Title:

Redacted



The Harry Fox Agency, Inc.

711 Third Avenue  
New York, NY 10017

212-922-3266  
212-922-3299 FAX

jcharlesworth@harryfox.com  
www.harryfox.com

Jacqueline C. Charlesworth  
Senior Vice President  
General Counsel

August 6, 2004

Redacted

Re: Digital Music Subscription Services Agreement

Dear REDACTED

Upon execution by both Parties, this letter ("Side Letter") will confirm the below understandings between REDACTED and The Harry Fox Agency, Inc. ("HFA") in connection with that certain Digital Music Subscription Service Agreement of even date between REDACTED and HFA (the "Agreement"). Capitalized terms used in this Side Letter that are not defined herein shall have the same meaning as they do in the Agreement.

REDACTED  
HFA seeks to facilitate launch of a subscription music service intended solely for the college student market ("Service") on an experimental basis, and has therefore agreed to a modified Advance Payment structure, as set forth in Section 4.1 of the Agreement ("Modified Advance"). In consideration of such Modified Advance, REDACTED hereby agrees to the following additional terms and conditions:

1. It is understood that HFA has agreed to the Modified Advance based on REDACTED express representation to HFA that, as a new service, it projects only REDACTED in revenue during its first year of operation and therefore is not in a position to pay HFA's usual advance.
2. The Modified Advance is nonprecedential in nature. Neither the Modified Advance nor this Side Letter, nor the fact that HFA on behalf of Participating HFA Publishers agreed to such terms, may be relied upon by either Party in an administrative or legal proceeding or in any other context as evidence or support for a particular royalty rate, rate structure or advance structure, including, without limitation, to suggest that a lower royalty rate or lower advance is or is not appropriate for a music service operating in the college or educational context.

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08/08/04 FRI 17:58 FAX 212 022 3209

Trinity Communications  
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3. Notwithstanding anything to the contrary that may be contained in the Agreement, the Agreement and Licenses issued under the Agreement shall be strictly limited to the delivery of On-Demand Streams and/or Limited Downloads through  
Redacted Service to individuals enrolled as students at particular colleges or universities with which REDACTED has entered into an agreement to provide its Service and who are registered as subscribers of the Service.

Redacted  
Additionally, REDACTED further agrees that, within two (2) business days following execution of the Agreement and this Side Letter, it shall pay to FFA by wire transfer a one-time administrative fee of REDACTED to help defray FFA's administrative costs associated with the Agreement, including the preparation and mailing of notices to FFA's publisher principals.

Sincerely,

  
Jacqueline C. Charlesworth

Date: 8/10/2004

Redacted

**EXHIBIT CO 0031**



The Harry Fox Agency, Inc.

711 Third Avenue  
New York, NY 10017

212-922-3266  
212-922-3299 FAX

jcharlesworth@harryfox.com  
www.harryfox.com

**Jacqueline C. Charlesworth**  
Senior Vice President  
General Counsel

August 6, 2004

**Redacted**

Re: Digital Music Subscription Services Agreement

Dear Mr. REDACTED

Upon execution by both Parties, this letter ("Side Letter") will confirm the below understandings between REDACTED and The Harry Fox Agency, Inc. ("HFA") in connection with that certain Digital Music Subscription Service Agreement of even date between REDACTED and HFA (the "Agreement"). Capitalized terms used in this Side Letter that are not defined herein shall have the same meaning as they do in the Agreement.


HFA seeks to facilitate REDACTED launch of a subscription music service intended solely for the college student market ("Service") on an experimental basis, and has therefore agreed to a modified Advance Payment structure, as set forth in Section 4.1 of the Agreement ("Modified Advance"). In consideration of such Modified Advance, REDACTED hereby agrees to the following additional terms and conditions:

1. It is understood that HFA has agreed to the Modified Advance based on REDACTED express representation to HFA that, as a new service, it projects only REDACTED in revenue during its first year of operation and therefore is not in a position to pay HFA's usual advance.
2. The Modified Advance is nonprecedential in nature. Neither the Modified Advance nor this Side Letter, nor the fact that HFA on behalf of Participating HFA Publishers agreed to such terms, may be relied upon by either Party in an administrative or legal proceeding or in any other context as evidence or support for a particular royalty rate, rate structure or advance structure, including, without limitation, to suggest that a lower royalty rate or lower advance is or is not appropriate for a music service operating in the college or educational context.

3. Notwithstanding anything to the contrary that may be contained in the Agreement, the Agreement and Licenses issued under the Agreement shall be strictly limited to the delivery of On-Demand Streams and/or Limited Downloads through REDACTED to individuals enrolled as students at particular colleges or universities with which REDACTED has entered into an agreement to provide its Service and who are registered as subscribers of the Service.

Additionally, REDACTED further agrees that, within two (2) business days following execution the Agreement and this Side Letter, it shall pay to HFA by wire transfer a one-time administrative fee of REDACTED to help defray HFA's administrative costs associated with the Agreement, including the preparation and mailing of notices to HFA's publisher principals.

Sincerely,



Jacqueline C. Charlesworth

AGREED AND ACCEPTED:

Redacted

Date: \_\_\_\_\_



08/10/2004 14:58 FAX  
08/08/04 FRI 17:58 FAX 212 922 3298

Trinity Communications  
NATIONAL MUSIC

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3. Notwithstanding anything to the contrary that may be contained in the Agreement, the Agreement and Licenses issued under the Agreement shall be strictly limited to the delivery of On-Demand Streams and/or Limited Downloads through Ruckus' Service to individuals enrolled as students at particular colleges or universities with which Ruckus has entered into an agreement to provide its Service and who are registered as subscribers of the Service.

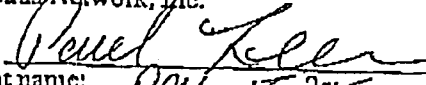
Additionally, Ruckus further agrees that, within two (2) business days following execution the Agreement and this Side Letter, it shall pay to FFA by wire transfer a one-time administrative fee of \$5,000 to help defray HFA's administrative costs associated with the Agreement, including the preparation and mailing of notices to HFA's publisher principals.

Sincerely,

  
Jacqueline C. Charlesworth

AGREED AND ACCEPTED:

Ruckus Network, Inc.

By:  Date: 8/10/2004  
Print name: PAUL LEVINE  
Title: SVP GENERAL COUNSEL

## EXHIBIT C

### Data Access and Use Agreement

This Data Access and Use Agreement ("Agreement") is entered into as of August 6, 2004, by and between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and **Redacted**, a Delaware corporation with an office at **Redacted** ("Recipient").

WHEREAS, Recipient (also referred to at times herein as "Licensee") and HFA have entered, or expect to enter, into that certain license agreement, dated as of August 6, 2004 (the "License Agreement"), pursuant to which HFA has granted, or will grant, limited rights to certain copyrighted musical compositions (each, a "Musical Work") in connection with the operation of Licensee's digital music subscription service; and

WHEREAS, Recipient seeks to access and use certain HFA Confidential Information (defined in Section 1 below) as necessary to obtain and administer the licenses issued under the License Agreement (each, a "License"), and as otherwise may be necessary to comply with Licensee's obligations under the License Agreement (collectively, the "Purpose"), and HFA has agreed to allow Recipient such limited access to and use of the HFA Confidential Information solely as necessary to accomplish the Purpose;

NOW THEREFORE, in consideration of the premises of and the mutual promises, covenants and agreements contained in this Agreement, HFA and Recipient agree as follows:

#### 1. HFA Confidential Information.

"HFA Confidential Information" means any and all information and material disclosed by HFA to Recipient or obtained by Recipient from HFA (whether in writing, or in oral, graphic electronic or any other form) that is proprietary and/or is intended by HFA to remain confidential relating to HFA's business and its databases, products, services, business strategies, capabilities or business affairs, including without limitation, all data and information related to the Musical Works and ownership thereof and/or HFA's publisher-principals.

#### 2. Non-Disclosure and Limited Use.

Recipient covenants (a) to hold all HFA Confidential Information in strict confidence, (b) that it shall disclose (or permit access to) the HFA Confidential Information solely to (or by) its employees, if any, who need to know or access such HFA Confidential Information to accomplish the Purpose, and who are bound by nondisclosure and use restrictions and obligations comparable to and at least as restrictive to those set forth herein, and (c) that it shall not disclose to any third party, including any agent, contractor, consultant or other party, or permit any such party to access, the HFA Confidential Information, unless and until such party has entered into a written agreement with HFA in form and substance of this Agreement governing the nondisclosure and use of the HFA Confidential Information. Recipient further covenants that it shall (y) use HFA Confidential Information solely as necessary to accomplish the Purpose, and (z) not extract, aggregate, derive or copy any HFA Confidential Information, whether by bulk transfer or through individual data query and response, for use or incorporation in any database, unless the sole purpose of such use or incorporation is to accomplish the Purpose. Recipient agrees to notify HFA immediately upon obtaining any information regarding unauthorized disclosure or access to the HFA Confidential Information.

Notwithstanding the disclosure and use restrictions in this Section 2, Recipient may disclose HFA Confidential Information (i) that is independently derived or acquired from a party not subject to a duty of confidentiality to HFA, or (ii) to the extent required to respond to the request of a court of competent jurisdiction, provided that upon receiving any such request and to the extent that it may do so without violating any law, Recipient prior to such disclosure advises HFA of such request in order that HFA may take such action as it deems appropriate to protect the HFA Confidential Information. During the Term (defined in Section 5 below) and for a period

of three (3) years following the termination or expiration of this Agreement, Recipient agrees to permit HFA to inspect, on a semi-annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Confidential Information is (or was) used in Recipient's facilities, if any, and to furnish whatever assistance is reasonably necessary to permit HFA to determine whether Recipient, including its employees, agents, subcontractors, independent contractors, consultants or other parties, if any, are in compliance with this Agreement.

**3. Ownership.**

Recipient acknowledges and agrees that all right, title and interest in and to the HFA Confidential Information (including all copies, extracts and portions thereof) is and shall remain the sole property of HFA. Recipient does not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights under this Agreement or any disclosure or access hereunder, except the limited right to use such HFA Confidential Information in strict accordance with the express provisions of this Agreement. All rights relating to the HFA Confidential Information that are not expressly granted hereunder to Recipient are reserved and retained by HFA.

**4. No Warranty; Limitation of Liability.**

EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE HFA CONFIDENTIAL INFORMATION OR ANY USE THEREOF, AND THE HFA CONFIDENTIAL INFORMATION IS PROVIDED ON AN "AS IS" BASIS. EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA HEREBY EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES, INCLUDING, BUT NOT LIMITED TO, CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA CONFIDENTIAL INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA CONFIDENTIAL INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT, EVEN IF HFA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

**5. Term; Termination.**

This Agreement will continue for the term of the License Agreement (including any agreed extensions thereof) (the "Term"), unless otherwise terminated by HFA in accordance herewith. HFA may terminate this Agreement at any time upon written notice, and shall have no further obligations to disclose to or permit access by Recipient to any HFA Confidential Information; and provided, however, that each party's rights and obligations shall otherwise survive the termination or expiration of this Agreement.

**6. Purging of HFA Confidential Information.**

Promptly following any expiration or termination of this Agreement, Recipient shall purge and destroy any and all records and copies of HFA Confidential Information from any Recipient databases and other systems under Recipient's direct or indirect control, and any other media on which any HFA Confidential Information may have been provided, together with all copies thereof, whether in printed or machine readable form; provided, however, that Recipient may retain any records and copies of HFA Confidential Information solely to the extent and for the period necessary to permit Licensee to fulfill any further obligations under the License Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall

be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

**7. Assistance of Counsel.**

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

**8. Specific Performance.**


Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

**9. Miscellaneous.**

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By:   
Name \_\_\_\_\_  
Title: \_\_\_\_\_

Redacted

**Execution Copy**

extent and for the period necessary to permit Licensee to fulfill any further obligations under the License Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

**7. Assistance of Counsel.**

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

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Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

**9. Miscellaneous.**

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By: \_\_\_\_\_  
Name:  
Title:

Redacted

**Execution Copy**

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective  
Date.

\_\_\_\_\_  
Jacqueline C. Charlesworth  
SVP & General Counsel  
The Harry Fox Agency, Inc.

Redacted

## Digital Music Subscription Service Agreement

This agreement (the "Agreement"), dated as of August 6, 2004 ("Effective Date"), is made by and between **Redacted**, a Delaware corporation ("Licensee") and The Harry Fox Agency, Inc. ("HFA"), (the "Parties").

WHEREAS, Licensee desires to offer to consumers certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works available to consumers by licensing such services;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and the parties by this Agreement seek to provide for greater clarity concerning the legal status of Covered Services (as defined below);

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to Licensee and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of unresolved legal issues and to facilitate the expeditious launch of digital music services, the Parties have reached this Agreement (which HFA represents reflects HFA's standard terms with respect to the concepts covered herein) with respect to terms pursuant to which Licensee may obtain licenses to make On-Demand Streams and Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(c)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Covered Services.** When Licensee seeks to use a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that are the subject matter of this Agreement in connection with the operation of its Covered Services, it may obtain through HFA on behalf of such HFA publisher-principal a mechanical license ("License") to make On-Demand Streams and/or Limited Downloads of the work through Covered Services, through to the end user, including by making server and related reproductions of the work used in the operation of Covered Services.

1.1. "Covered Service" means a service that offers (but the offerings of which are not necessarily limited to) On-Demand Streams and/or Limited Downloads of sound recordings of musical works from servers located within the United States (including the territories and possessions thereof), where the basic charge to users for the service is a recurring subscription fee (in contrast to the basic charge being a per-download, per-play or per-song fee), including any use of such a service on a limited basis without charge to users in order to promote the subscription service.

1.2. "On-Demand Stream" means an on-demand, real-time digital transmission of a sound recording of a single musical work to allow a user to listen to a particular sound recording chosen by the user at a time chosen by the user, using streaming technology, which may include but is not limited to Real Audio or Windows Media Audio, that is configured by the provider of the Covered Service in a manner designed so that such transmission will not result in a substantially complete reproduction of a sound recording being made on a local storage device (e.g., the hard drive of the user's computer or a portable device) so that such reproduction is available for listening other than at substantially the time of the transmission.

1.3. "Limited Download" means a digital transmission of a time-limited or other use-limited download of a sound recording of a single musical work to a local storage device (e.g., the hard drive of the user's computer or a portable device), using technology designed to cause the downloaded file to be available for listening only either (1) during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) not to extend more than thirty (30) days beyond the expiration of the user's subscription, or (2) for a limited number of times not to exceed twelve (12) times after the expiration of the user's subscription.

1.4. Any HFA publisher-principal that grants a License and/or accepts a portion of an Advance Payment hereunder is referred to herein as a "Participating HFA Publisher." The term "Participating HFA Publisher" is limited to such entities and their majority-owned subsidiaries.

## 2. Covered Deliveries.

2.1. A License with respect to a musical work includes all reproduction, distribution and DPD rights necessary for Covered Services to make On-Demand Streams and Limited Downloads of that work, from the making of server reproductions to the transmission and local storage of the On-Demand Streams or Limited Downloads, in all cases made subject to and in accordance with the terms hereof. A License does not extend to other transmissions made by a Covered Service or to activities not encompassed by a mechanical license, including, without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to fragment or excerpt musical works (other than for promotional purposes in strict accordance with Section 2.2 below), rights to synchronize musical works with visual images resulting in audiovisual works, or karaoke rights, all of which rights are specifically reserved. The Parties agree that server reproductions made under a License to transmit On-Demand Streams or Limited Downloads may be used to make transmissions other than On-Demand Streams and Limited Downloads; provided that the foregoing is without prejudice to any applicable requirement, if any, that Licensee also obtain a license for such other transmissions made using such server reproductions.



For the avoidance of doubt, it is understood that this Agreement does not address or extend to any sound recording or performance rights that may be implicated by the making of On-Demand Streams or Limited Downloads through Covered Services.

2.2. A License includes the right to make, and there shall be no separate payment or accounting for, On-Demand Streams of Promotional Excerpts (as defined below) of sound recordings of musical works licensed hereunder used solely for promotional purposes, provided that the relevant copyright owner or copyright owners of such sound recordings has duly authorized the relevant copyright owner or copyright owners of such musical work (or an organization of copyright owners designated by such copyright owners as their common agent) to make On-Demand Streams of Promotional Excerpts of that sound recording for the purpose of promoting that musical work without payment of any royalty. "Promotional Excerpt" is defined as a stream consisting of no more than thirty (30) seconds of playing time of the sound recording of a musical work, or in the case of sound recordings with a playing time of more than five minutes, a stream that is of no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of the sound recording of the musical work, that is made available free of charge to the end user for promotional purposes only.

### 3. Licensing Process.

3.1. Commencing on the Effective Date, Licensee may submit License requests to HFA for On-Demand Streams and/or Limited Downloads made through Covered Services electronically in the form set forth in Exhibit A (as such form may reasonably be modified by HFA from time to time). When Licensee submits a License request in accordance with this Section 3.1, HFA shall, after processing the License request, return to Licensee an electronic file specifying the licenses issued. If Licensee submits a License request in accordance with this Section 3.1 but the request contains insufficient information for HFA to find a match for the relevant work in its databases, HFA will work with Licensee to provide the information necessary to enable a License to be issued, and if Licensee resubmits such request with the necessary information and the License can be issued, the provisions of Section 3.4 shall apply from the date of the original request. The Parties acknowledge the importance to HFA and music publishers of having License requests submitted promptly, and the importance to Licensee of having License forms issued promptly. The Parties shall cooperate in good faith to promote each of those goals.

3.2. The authority of HFA to license any individual musical work on behalf of its publisher principals is subject to the approval of the relevant publisher-principal. HFA shall not require its publisher principals to opt in to this Agreement either before or after commencing to issue Licenses, but will establish an opt out period before commencing to issue Licenses, which period will end no later than September 7, 2004 (the "Opt Out Period"). If an HFA publisher-principal at any time requests that HFA not issue Licenses on its behalf (either with respect to particular musical works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a License issued prior to such request. Upon the expiration of the Opt Out Period, if Licensee so requests, HFA shall advise Licensee of any HFA publisher principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement (as well as any HFA publisher principals that have previously provided notice to HFA that they are opting out of all agreements of this nature).

3.3. HFA shall issue Licenses hereunder with respect to a musical work in its entirety if one or more of its publisher-principals owns or controls a partial interest in such musical work, even if other co-owners of such musical work are not HFA publisher-principals, except that, pursuant to Section 3.2, if all the HFA publisher-principals that own or control a partial interest in such work request that HFA not issue Licenses on their behalf, HFA will not issue such Licenses. In the case of a License issued as described in this Section 3.3, Licensee shall pay directly to each co-owner that is not an HFA publisher-principal (or such co-owner's authorized payee) such co-owner's share of the applicable royalty payments under Section 6.1.

3.4. License forms issued by HFA pursuant to this Agreement shall be retroactive to the date of the License request made by Licensee on or after the Effective Date in accordance with Section 3.1. To the extent that Licensee makes On-Demand Streams and/or Limited Downloads of musical works pending the processing by HFA of license forms in response to proper License requests submitted on or after the Effective Date in accordance with Section 3.1, HFA shall not directly or indirectly file, encourage, aid, support, finance, contribute to, promote, or participate in any claim, suit, action or proceeding asserting that such activities are infringing.

3.5. Nothing in this Agreement, including but not limited to the availability of Licenses or the procedures for obtaining the same, shall preclude Licensee from at any time serving or filing a notice of intention to obtain a compulsory license in accordance with applicable law or, other than in Article 8, imply that any notice of intention so served or filed is valid or invalid. Nothing in this Agreement shall preclude Licensee from seeking, or HFA or any of its publisher-principals from granting, direct licenses to Licensee, including without limitation for use of musical works on the Covered Services, on whatever terms might be agreed upon between the relevant parties.

#### 4. Advance Payment.

4.1. Upon both parties' execution of this Agreement, Licensee shall pay to HFA within two (2) business days a non-refundable advance royalty payment ("Advance Payment") equal to **Redacted**. Should Licensee choose to continue operation of its Covered Services for a second year following the one-year anniversary of this Agreement, (a) Licensee shall pay upon the one-year anniversary an additional non-refundable Advance Payment in an amount acceptable to HFA, as negotiated by the parties, and (b) Licensee shall commit to pay, commencing upon the second anniversary of the Agreement, a monthly supplementary Advance Payment in an amount acceptable to HFA, as negotiated by the parties; provided, however, that Licensee shall not be required to make such monthly supplementary Advance Payments if by the second anniversary of this Agreement there has been a final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding. Should Licensee fail to fulfill its obligations under the foregoing clauses (a) and (b) by the one-year anniversary of the Agreement (or notify HFA in writing of its intent not to fulfill such obligations), notwithstanding anything to the contrary in the Agreement, upon the one-year anniversary of the Agreement, (i) the Agreement and all Licenses issued under the Agreement shall automatically terminate, and (ii) HFA shall be thereafter free to distribute all or any portion of the initial **Redacted** Advance Payment to its publisher-principals as HFA deems appropriate. **Redacted**

4.2. Effective at the second anniversary of the Effective Date or any time thereafter, Licensee may terminate this Agreement upon thirty (30) days advance written notice to HFA. In the event Licensee does so, all Licenses previously issued under this Agreement shall terminate at the same time as this Agreement, without prejudice to the right of Licensee thereafter to obtain new licenses under 17 U.S.C. § 115. In the case of termination by Licensee (a) payments shall be due in accordance with Section 6.1 for activities under this Agreement prior to the termination of the relevant Licenses, (b) Advance Payments may be applied against such payments in accordance with Section 4.4, and (c) to the extent remaining, Advance Payments also may be applied to royalties due under any new licenses for On-Demand Streams and/or Limited Downloads made through Covered Services, which licenses are issued by HFA at least one year after the relevant date of termination of Licensee's Licenses. In addition to the foregoing, if there is a decision of the U.S. Copyright Office or a court, or any new legislation, inconsistent with Section 8.1, with the result that mechanical royalties are not required to be paid for some or all On-Demand Streams and/or Limited Downloads made through Covered Services, then the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be reduced to take into account such decision or legislation, based on actual usage under this Agreement to date, with the exact amount of such reduction to be agreed upon by the Parties promptly after such decision or legislation; provided that if any such decision is appealed and finally reversed on appeal, the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be restored, and Licensee shall promptly pay to HFA the total amount by which the supplementary Advance Payment was reduced in the interim.

4.3. HFA shall deposit Advance Payments into an interest-bearing bank account (with such interest being treated as part of the Advance Payment). HFA shall be free to distribute the initial and supplementary Advance Payments to HFA publisher-principals in accordance with a reasonable and nondiscriminatory methodology based on market share, actual usage or a per musical work payment (which methodology HFA shall provide to Licensee). Except insofar as it is recouped pursuant to Sections 4.4 and/or 4.5, the Advance Payment shall be nonrefundable.

4.4. Upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads, through negotiation and/or a CARP proceeding, as the case may be, the total amount of Advance Payments (including interest) shall be applied against undisputed amounts owed to HFA on behalf of its publisher-principals for On-Demand Streams and Limited Downloads made through Covered Services pursuant to Licenses issued under this Agreement. Such Advance Payments for these uses shall be applied to the account of Licensee. If the Advance Payments are not fully recouped at such time, any remainder of the Advance Payments thereafter shall be applied against all undisputed amounts owed to HFA on behalf of its publisher-principals by Licensee under mechanical licenses issued by HFA for On-Demand Streams and Limited Downloads made through Covered Services (including but not limited to Licenses under this Agreement), until such amount is fully recouped.

4.5. At the request of HFA, with Licensee's written consent, which consent shall not be withheld unreasonably, Advance Payments may be applied to other undisputed amounts (e.g., other mechanical royalties) owed by Licensee to HFA on behalf of its publisher-principals.

5. Royalty. The royalty rate payable under a License shall be determined through negotiation and/or a CARP proceeding. The applicable rate will be structured as determined through

negotiation or by the CARP, and may (or may not) comprise separate royalty rate components for distinct uses of the musical work authorized by the License. The Parties shall meet to negotiate royalty rates in good faith. HFA reserves its right to seek interest as a part of such royalty rate determination. Licensee reserves its right to seek to have such royalty rate determination reflect any payments under foreign copyrights in the case where On-Demand Streams or Limited Downloads are transmitted to users outside of the United States. Whether royalty rates are determined by negotiation or a CARP, and regardless of how royalty rate categories may be denominated, the Parties shall seek a determination of royalty rates such that it is clear what royalty rates are applicable to each of On-Demand Streams and Limited Downloads.

## 6. Accounting and Payment.

6.1. Beginning with the issuance of a License, Licensee will be required to account to HFA in electronic form on a quarterly basis for activity under such License, 45 days after the close of each quarter, and specifically including the number of On-Demand Streams and Limited Downloads of each work made during such quarter. Such quarterly reports shall be in the form set forth in Exhibit B (as such form may reasonably be modified by HFA from time to time) and shall include, without limitation, a breakdown of On-Demand Streams and Limited Downloads made by Covered Services under Licenses in the applicable quarter, by musical work and delivery method code (indicating On Demand-Streams and/or Limited Downloads), and including ISRC number if available, catalog number if available and HFA license number if available (in the same manner indicated by Licensee in its License request), and shall also identify the specific retail outlet through which such On-Demand Streams and Limited Downloads were made. Licensee shall preserve all usage and financial data that reasonably should be expected to be relevant, upon the determination of royalty rates, to the calculation of royalties hereunder and use commercially reasonable efforts to do so for each Covered Service it operates hereunder. Subject to Article 4 and Section 3.3, upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads, through negotiation and/or a CARP proceeding, Licensee shall make the applicable payment for all previous quarters then completed, from the launch of the applicable Covered Services to date, within 45 days, to be accompanied by a cumulative statement setting forth and aggregating the information provided in the previous quarterly reports supplied under this Agreement. Thereafter, on a quarterly basis, 45 days after the close of each quarter, Licensee shall account to HFA for activities and/or revenues realized on such activities during such quarter as determined through negotiation and/or by regulation, providing such information as is required by regulation, a CARP, and/or a negotiated rate agreement, and, subject to Article 4 and Section 3.3, pay royalties at the applicable rate. Notwithstanding the foregoing, HFA reserves its right to seek more frequent access, including without limitation real-time access, to usage information.

6.2. At the request of HFA, Licensee shall accompany its quarterly reports with any available data in addition to that described in Section 6.1 concerning the numbers of On-Demand Streams and Limited Downloads made through Covered Services operated by Licensee (but not any personally identifying information), which data is regularly gathered or compiled by Licensee or provided to Licensee by its licensees with the legal right to disclose such data to HFA hereunder; provided that Licensee may provide any such data to HFA in whatever form it is available to Licensee in the ordinary course of its business and subject to any applicable confidentiality and other contractual use restrictions; and provided further that, before

making any such request, HFA shall review with Licensee the types of such data Licensee has and can disclose to HFA, and the form in which such data is available, and HFA shall not request, and Licensee shall not be required to provide, data that (given the volume and form of such data, the degree to which such data is reflected in quarterly reports, the data processing capabilities of HFA and Licensee, HFA's intentions to use such information, and other relevant factors) would not be commercially reasonable to provide. In addition, to the extent such information is available to Licensee and can be disclosed to HFA hereunder, at the request of HFA, Licensee shall accompany its quarterly reports with the total number of subscribers to and total number of subscriber months for each Covered Service operated by Licensee during the reporting period; provided that any such information relating to a Covered Service operated by Licensee shall be subject to an appropriate confidentiality restriction, and any such information provided to Licensee by a third party shall be subject to any applicable confidentiality and other contractual use restrictions.

7. Term. The term of this Agreement shall commence on the Effective Date and, subject to Sections 4.1, 4.2 and 8.5, continue until the final non-appealable determination of royalty rates for each of On-Demand Streams and Limited Downloads, through negotiation and/or a CARP proceeding. New Licenses shall continue to be issued pursuant to this Agreement for the duration of such term. Thereafter, Licensee may request, and HFA shall issue, mechanical licenses covering On-Demand Streams and Limited Downloads at the applicable royalty rates in accordance with its customary practices for the issuance of licenses where there is an applicable statutory rate, which the Parties currently understand to include the means of application described in Section 3.1. Notwithstanding the foregoing, Licenses once issued under this arrangement shall remain in effect unless terminated for default in respect to payment (once royalty rates are determined) or accounting (either before or after royalty rates are determined) pursuant to 17 U.S.C. § 115(c)(6) (or other applicable provision of law, if any), it being understood that a License may not be terminated for such a default where the default is remedied as provided in 17 U.S.C. § 115(c)(6). In addition, the provisions of Sections 4.2, 4.4 and 4.5, and of Articles 6, 7 and 10, shall survive the expiration or termination of this Agreement or any License under this Agreement.

8. Legal Framework for Agreement.

8.1. Subject to the other provisions of this Article 8, in order to avoid litigation and to provide assurance to Licensee in connection with the launch of its digital music services and enable HFA's issuance of license forms for Covered Services hereunder:

(a) The Parties agree that under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act. The Parties further agree that, under current law, the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of a DPD, and thus does not require a mechanical license. The foregoing does not express or imply any agreement that, and shall not be used to support any

argument that, the process of making On-Demand Streams other than through Covered Services, or the process of making streams that would not qualify for a statutory license under Section 114(d)(2) of the Copyright Act (including, without limitation, because such streams are part of an "interactive service" (as that term is defined in Section 114(j)(7)) or exceed the "sound recording performance complement" (as that term is defined in Section 114(j)(13)) does or does not involve the making and distribution of a DPD, and the Parties expressly reserve all their rights with respect to that issue.

(b) The Parties agree that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (*i.e.*, inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

(c) The Parties agree that under current law a compulsory license to make On-Demand Streams and Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the On-Demand Streams and Limited Downloads) is available under Section 115 of the Copyright Act.

8.2. Subject to Sections 8.3 and 8.5, for the term of this Agreement, no party to this Agreement and no Participating HFA Publisher shall take a position contrary to or inconsistent with Section 8.1, or lend support or resources, financial or otherwise, to any other person or entity taking a contrary or inconsistent position, before the Copyright Office, a CARP, a court or any other government office or tribunal. Thereafter, no party to this Agreement and no Participating HFA Publisher shall commence or lend support to any action in court to challenge the validity of the rates determined pursuant to Article 5 on the ground that On-Demand Streams and Limited Downloads do not involve the making or distribution of DPDs. It is understood that, for purposes of this Section 8.2, Licensee or Participating HFA Publishers shall not be deemed to lend financial support or resources to affiliated entities merely through intra-enterprise financial arrangements in the ordinary course of business.

8.3. Notwithstanding Sections 8.1 and 8.2, the Parties and Participating HFA Publishers may at any time (1) raise and litigate (including, without limitation, before a CARP) the economic value of, and the appropriate royalty rates to be applied to, On-Demand Streams and Limited Downloads; (2) take or support any position they choose with respect to sound recordings (as distinguished from any musical works embodied therein) and the rights therein, including, without limitation, rights under Sections 106 and 114 of the Copyright Act, and (3) make or lend support to any arguments they choose to prosecute, or defend or counterclaim against, an infringement claim relating to activities before the Effective Date. Notwithstanding Sections 8.1 and 8.2, Licensee may at any time make or lend support to any arguments they choose to defend or counterclaim against an infringement claim relating to activities on or after the Effective Date, in the event that a License with respect to the relevant works is not available hereunder (it being understood that, subject to Section 8.4, HFA and Participating HFA Publishers may participate in the litigation of any such claim, so long as their doing so is consistent with Sections 8.1 and 8.2). The Parties agree that they will act in good faith not to

induce, promote or encourage the litigation of an infringement claim relating to activities as described in the immediately preceding sentence.

8.4. To the extent that an action being litigated by Licensee involves the question of the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c) for a musical work for which a License is not available under this Agreement, HFA shall not participate in or lend support to such action. The Parties agree that they will act in good faith not to induce, promote or encourage litigation concerning the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c). For purposes of this Article 8, HFA shall include its parent National Music Publishers' Association, Inc.

8.5. To the extent that a final, non-appealable decision of the Copyright Office or a court, or any new legislation, is inconsistent with Section 8.1, this Agreement shall be inapplicable to the extent of the inconsistency as of the date thereof, but subject to Article 4, Licensee shall not be entitled to a refund of any monies paid prior to such date.

8.6. Nothing in this Article 8 shall be used by, or be enforceable by, a third party not a Party to this Agreement, in any manner or in any context, including without limitation in any legal proceeding. This Agreement does not give rise to any third party beneficiary rights in any party other than Participating HFA Publishers. The agreements set forth in this Article 8 and the course of dealing hereunder shall be inadmissible, and shall not be used to support any argument of law, in any litigation or arbitration relating to (1) activities before the Effective Date or (2) activities other than making and distributing On-Demand Streams and Limited Downloads through Covered Services, except making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act.

## 9. Security.

9.1. Licensee shall incorporate, as part of the distribution of sound recordings embodying licensed works to users pursuant to this Agreement, a security technology, including, but not limited to, use of a digital rights management technology, for existing and prospective users that is designed to permit transmission to an end user in a secure manner (e.g., so as to prevent illicit copying).

9.2. To the extent the Covered Services use third-party technology in order to satisfy the requirements of Section 9.1, Licensee shall use its commercially reasonable efforts to maintain and upgrade such technology by monitoring any third-party announcement made available to Licensee of bug-fixes, security holes and functionality improvements, obtaining such upgrades, and installing and distributing such upgrades as reasonably necessary to maintain the integrity of the Covered Services.

9.3. Without limitation, Licensee shall properly implement security technologies and methods that are commercially acceptable to and generally used by the music industry to deliver On-Demand Streams and Limited Downloads of sound recordings embodying musical works in a secure manner through Covered Services, such that:

(a) in each case, the delivery or playback of a sound recording embodying a licensed work is reliably limited to the single intended device authenticated by the

Licensee as belonging to a current subscriber and only in accordance with the use limitation rules applicable to such sound recording;

(b) all On-Demand Streams are protected in a manner designed to prevent software applications from being able to capture the streams to be saved for later rendering on any device;

(c) all Limited Downloads and On-Demand Streams shall only be transmitted to devices that fully and accurately support the security technologies used by the Covered Service, in order to accurately enforce the applicable use limitation rules, including, without limitation, the applicable time limits and playback limits imposed by Article 1;

(d) On-Demand Streams and Limited Downloads cannot be re-transmitted from the intended destination device to any other device, whether now known or hereafter invented, except where a sound recording is in a fully encrypted format that is unplayable on any such other device in any manner, whether now known or hereafter invented;

(e) the Licensee at all times maintains an accurate count of the number and type of transmissions (both On-Demand Streams and Limited Downloads) into user's devices from either the Covered Service directly or through the users' personal computer or other intermediate hosting device, whether now known or hereafter invented, the identity of the copyrighted work transmitted in each case, the applicable use limitation rule for such work, and all information necessary to fulfill the accounting requirements of Article 6 and any other obligations of Licensee under this Agreement.

9.4. In the event of a breach of any security technology(ies) used by Licensee to perform its obligations under this Article 9, or as otherwise set forth in this Agreement, Licensee shall use its best efforts to devise a solution to such security breach (or cause such solution to be devised and implemented) or alternatively, immediately cease all distribution of the licensed works. Licensee shall restore as quickly as possible the integrity of the security technologies used in the operation of Covered Services and shall keep HFA reasonably informed as to the status thereof.

9.5. Licensee shall not edit, alter or defeat any copyright protection technology or mechanism embedded in or associated with the sound recordings embodying the licensed works.

9.6. Licensee shall use commercially reasonable efforts to prevent the creation of any unauthorized copies of any licensed works in any facilities in its control in any form (including but not limited to, copies created by employees or contractors outside the immediate scope of their employment), and shall use its commercially reasonable efforts to prevent the creation of such unauthorized copies by any users. If Licensee learns of any material circumvention of the technology used to satisfy the requirements of Section 9.1 or of any material incident of unauthorized manufacture, advertising, distribution, lease or sale of the licensed works relating to a Covered Service (any of the foregoing an "Unauthorized Use"), Licensee shall promptly provide HFA with written notification of such Unauthorized Use and take all reasonable steps, and reasonably cooperate with HFA, to prevent such Unauthorized Use. Without limiting any other rights and remedies of HFA and its Licensors, if HFA learns, and



provides Licensee with reasonably credible evidence, that there are widespread, significant and substantial Unauthorized Uses, upon ten (10) days' notice by HFA, Licensee must, unless it secures its technology against such Unauthorized Uses to the satisfaction of HFA within the ten (10) day period, suspend all On-Demand Streams or Limited Downloads of the licensed works under this Agreement pending Licensee's securing its technology against such Unauthorized Uses to the reasonable satisfaction of HFA. Licensee will, on a quarterly basis, inform HFA of all known material breaches or attempted breaches of its security measures and Licensee's response to each of those breaches or attempted breaches.

#### 10. Royalty and Security Compliance.

10.1. Notwithstanding, without limiting and in addition to the general right pursuant to industry custom and practice of HFA and/or any Participating HFA Publisher to examine the books and records of Licensee in connection with Licensee's use of the Licensed Works, HFA shall be entitled, upon thirty (30) days' prior written notice to Licensee, to conduct, at the expense of HFA, an examination of the books, records, operations and security systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, payment and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than three (3) years following the termination of this Agreement.

10.2. During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that reasonably may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's quarterly reports and/or that reflect or summarize Licensee's quarterly reports; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's security systems (such information, along with the information described in the items (a)(i) and (a)(ii) of this Section 10.2, collectively referred to, as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, security systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Article 9. Licensee shall provide the information, systems access and personnel required by this Section 10.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

10.3. During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall

make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.

10.4. Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least three (3) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the reasonable satisfaction of HFA.

10.5. If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

11. Data Access and Use Agreement. HFA shall have no obligation to perform its obligations hereunder unless and until Licensee enters into the Data and Access Use Agreement, attached hereto and incorporated herein as Exhibit C (the "Data Access and Use Agreement"), governing the nondisclosure and use of HFA Confidential Information (as defined in the Data Access and Use Agreement) by Licensee. To the extent Licensee seeks to have a third-party individual or entity obtain access to HFA Confidential Information for purposes of obtaining and administering Licenses and otherwise fulfilling its obligations under this Agreement (each, a "Third-Party Administrator"), Licensee must obtain HFA's prior consent of each such Third-Party Administrator (such consent not to be unreasonably withheld). Upon HFA's consent to Licensee's use of such Third-Party Administrator, HFA will require that such Third-Party Administrator enter into a data access and use agreement with HFA substantially in the form of the Data Access and Use Agreement, prior to allowing such Third-Party Administrator access to any HFA Confidential Information.

12. Miscellaneous.

12.1. Publicity. Licensee and HFA may issue a mutually agreed joint press release announcing this arrangement within a reasonable time period following the Effective Date. In HFA's communications to its members concerning this Agreement, HFA shall encourage its publisher principals to avail themselves of this Agreement.

12.2. Assignment. This Agreement shall be binding upon and inure to the benefit of all of the parties and their respective permitted successors and permitted assigns. Any assignment or transfer by Licensee of any of its rights or licenses under this Agreement shall require the prior written consent of HFA, which shall not be unreasonably withheld but which shall be subject to the approval of HFA's publisher-principals.

12.3. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to conflicts of law principles thereof).

12.4. Amendment. This Agreement may be modified or amended only by a writing signed by each of the Parties.

12.5. Entire Agreement. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

12.6. Counterparts. This Agreement may be executed in counterparts, including by means of facsimile, each of which shall be deemed to be an original, but which taken together shall constitute one agreement.

12.7. Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

12.8. Notices. All notices shall be in writing and shall be deemed given when (a) delivered personally; (b) upon receipt of a transmittal confirmation if sent by facsimile or like transmission with a copy by first class U.S. mail; or (c) upon delivery if sent by Federal Express, Express Mail or similar overnight courier service, to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number for a party as shall be specified by like notice):

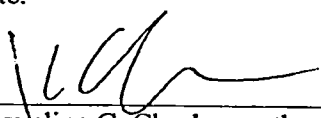
if to HFA

The Harry Fox Agency, Inc.  
711 Third Avenue  
New York, New York 10017  
Attention: General Counsel  
Telephone: (212) 922-3260  
Facsimile: (212) 953-2471

if to Licensee:

**Redacted**

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

  
\_\_\_\_\_  
Jacqueline C. Charlesworth  
SVP & General Counsel  
The Harry Fox Agency, Inc.

**Redacted**

**EXHIBIT A**

[See attached]

**EXHIBIT CO 0032**

## Digital Music Subscription Service Agreement

This agreement (the "Agreement"), dated as of July 26, 2004 ("Effective Date"), is made by and between **Redacted**, a Washington corporation ("Licensee") and The Harry Fox Agency, Inc. ("HFA"), (the "Parties").

WHEREAS, Licensee desires to offer to consumers certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works available to consumers by licensing such services;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and the parties by this Agreement seek to provide for greater clarity concerning the legal status of Covered Services (as defined below);;

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to Licensee and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of unresolved legal issues and to facilitate the expeditious launch of digital music services, the Parties have reached this Agreement (which HFA represents reflects HFA's standard terms with respect to the concepts covered herein) with respect to terms pursuant to which Licensee may obtain licenses to make On-Demand Streams and/or Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(c)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Covered Services.** When Licensee seeks to use a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that are the subject matter of this Agreement in connection with the operation of its Covered Services, it may obtain through HFA on behalf of such HFA publisher-principal a mechanical license ("License") to make On-Demand Streams and/or Limited Downloads of the work through Covered Services, through to the end user, including by making server and related reproductions of the work used in the operation of Covered Services.

1.1. "Covered Service" means a service that offers (but the offerings of which are not necessarily limited to) On-Demand Streams and/or Limited Downloads of sound recordings of musical works from servers located within the United States (including the territories and possessions thereof), where the basic charge to users for the service is a recurring subscription fee (in contrast to the basic charge being a per-download, per-play or per-song fee), including any use of such a service on a limited basis without charge to users in order to promote the subscription service.

1.2. "On-Demand Stream" means an on-demand, real-time digital transmission of a sound recording of a single musical work to allow a user to listen to a particular sound recording chosen by the user at a time chosen by the user, using streaming technology, which may include but is not limited to Real Audio or Windows Media Audio, that is configured by the provider of the Covered Service in a manner designed so that such transmission will not result in a substantially complete reproduction of a sound recording being made on a local storage device (e.g., the hard drive of the user's computer or a portable device) so that such reproduction is available for listening other than at substantially the time of the transmission.

1.3. "Limited Download" means a digital transmission of a time-limited or other use-limited download of a sound recording of a single musical work to a local storage device (e.g., the hard drive of the user's computer or a portable device), using technology designed to cause the downloaded file to be available for listening only either (1) during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) not to extend more than thirty (30) days beyond the expiration of the user's subscription, or (2) for a limited number of times not to exceed twelve (12) times after the expiration of the user's subscription.

1.4. Any HFA publisher-principal that grants a License and/or accepts a portion of an Advance Payment hereunder is referred to herein as a "Participating HFA Publisher." The term "Participating HFA Publisher" is limited to such entities and their majority-owned subsidiaries.

## 2. Covered Deliveries.

2.1. A License with respect to a musical work includes all reproduction, distribution and DPD rights necessary for Covered Services to make On-Demand Streams and Limited Downloads of that work, from the making of server reproductions to the transmission and local storage of the On-Demand Streams or Limited Downloads, in all cases made subject to and in accordance with the terms hereof. A License does not extend to other transmissions made by a Covered Service or to activities not encompassed by a mechanical license, including, without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to fragment or excerpt musical works (other than for promotional purposes in strict accordance with Section 2.2 below), rights to synchronize musical works with visual images resulting in audiovisual works, or karaoke rights, all of which rights are specifically reserved. The Parties agree that server reproductions made under a License to transmit On-Demand Streams or Limited Downloads may be used to make transmissions other than On-Demand Streams and/or Limited Downloads; provided that the foregoing is without prejudice to any applicable requirement, if any, that Licensee also obtain a license for such other transmissions made using such server reproductions.

For the avoidance of doubt, it is understood that this Agreement does not address or extend to any sound recording or performance rights that may be implicated by the making of On-Demand Streams or Limited Downloads through Covered Services.

2.2. A License includes the right to make, and there shall be no separate payment or accounting for, On-Demand Streams of Promotional Excerpts (as defined below) of sound recordings of musical works licensed hereunder used solely for promotional purposes, provided that the relevant copyright owner or copyright owners of such sound recordings has duly authorized the relevant copyright owner or copyright owners of such musical work (or an organization of copyright owners designated by such copyright owners as their common agent) to make On-Demand Streams of Promotional Excerpts of that sound recording for the purpose of promoting that musical work without payment of any royalty. "Promotional Excerpt" is defined as a stream consisting of no more than thirty (30) seconds of playing time of the sound recording of a musical work, or in the case of sound recordings with a playing time of more than five minutes, a stream that is of no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of the sound recording of the musical work, that is made available free of charge to the end user for promotional purposes only.

### 3. Licensing Process.

3.1. Commencing on the Effective Date, Licensee may submit License requests to HFA for On-Demand Streams and/or Limited Downloads made through Covered Services electronically in the form set forth in Exhibit A (as such form may reasonably be modified by HFA from time to time). When Licensee submits a License request in accordance with this Section 3.1, HFA shall, after processing the License request, return to Licensee an electronic file specifying the licenses issued. If Licensee submits a License request in accordance with this Section 3.1 but the request contains insufficient information for HFA to find a match for the relevant work in its databases, HFA will work with Licensee to provide the information necessary to enable a License to be issued, and if Licensee resubmits such request with the necessary information and the License can be issued, the provisions of Section 3.4 shall apply from the date of the original request. The Parties acknowledge the importance to HFA and music publishers of having License requests submitted promptly, and the importance to Licensee of having License forms issued promptly. The Parties shall cooperate in good faith to promote each of those goals.

3.2. The authority of HFA to license any individual musical work on behalf of its publisher principals is subject to the approval of the relevant publisher-principal. HFA shall not require its publisher principals to opt in to this Agreement either before or after commencing to issue Licenses, but will establish an opt out period before commencing to issue Licenses, which period will end no later than six weeks following the Effective Date (the "Opt Out Period"). If an HFA publisher-principal at any time requests that HFA not issue Licenses on its behalf (either with respect to particular musical works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a License issued prior to such request. Upon the expiration of the Opt Out Period, if Licensee so requests, HFA shall advise Licensee of any HFA publisher principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement (as well as any HFA publisher principals that have previously provided notice to HFA that they are opting out of all agreements of this nature).



3.3. HFA shall issue Licenses hereunder with respect to a musical work in its entirety if one or more of its publisher-principals owns or controls a partial interest in such musical work, even if other co-owners of such musical work are not HFA publisher-principals, except that, pursuant to Section 3.2, if all the HFA publisher-principals that own or control a partial interest in such work request that HFA not issue Licenses on their behalf, HFA will not issue such licenses. In the case of a License issued as described in this Section 3.3, Licensee shall pay directly to each co-owner that is not an HFA publisher-principal (or such co-owner's authorized payee) such co-owner's share of the applicable royalty payments under Section 6.1.

3.4. License forms issued by HFA pursuant to this Agreement shall be retroactive to the date of the License request made by Licensee on or after the Effective Date in accordance with Section 3.1. To the extent that Licensee makes On-Demand Streams and/or Limited Downloads of musical works pending the processing by HFA of license forms in response to proper License requests submitted on or after the Effective Date in accordance with Section 3.1, HFA shall not directly or indirectly file, encourage, aid, support, finance, contribute to, promote, or participate in any claim, suit, action or proceeding asserting that such activities are infringing.

3.5. Nothing in this Agreement, including but not limited to the availability of Licenses or the procedures for obtaining the same, shall preclude Licensee from at any time serving or filing a notice of intention to obtain a compulsory license in accordance with applicable law or, other than in Article 8, imply that any notice of intention so served or filed is valid or invalid. Nothing in this Agreement shall preclude Licensee from seeking, or HFA or any of its publisher-principals from granting, direct licenses to Licensee, including without limitation for use of musical works on the Covered Services, on whatever terms might be agreed upon between the relevant parties.

#### 4. Advance Payment.

4.1. Licensee shall pay to HFA a non-refundable advance royalty payment ("Advance Payment") as per the following terms: **Redacted** upon both parties' signing the Agreement, and (ii) upon the one-year anniversary of the Agreement, an additional **Redacted** multiplied by a percentage representing the number of musical works licensed through HFA under this Agreement divided by the total number of musical works licensed for use on Licensee's Covered Service(s) at the time of such payment. If, by the second anniversary of this Agreement, there has then been no final non-appealable determination of royalty rate(s) for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, then, subject to Section 4.2, until such a determination, Licensee shall each month pay to HFA a supplementary Advance Payment of **Redacted**

4.2. Effective at the second anniversary of the Effective Date or any time thereafter, Licensee may terminate this Agreement upon thirty (30) days advance written notice to HFA. In the event Licensee does so, all Licenses previously issued under this Agreement shall terminate at the same time as this Agreement, without prejudice to the right of Licensee thereafter to obtain new licenses under 17 U.S.C. § 115. In the case of termination by Licensee (a) payments shall be due in accordance with Section 6.1 for activities under this Agreement prior to the termination of the relevant Licenses, (b) Advance Payments may be applied against such payments in accordance with Section 4.4, and (c) to the extent remaining, Advance

Payments also may be applied to royalties due under any new licenses for On-Demand Streams and/or Limited Downloads made through Covered Services, which licenses are issued by HFA at least one year after the relevant date of termination of Licensee's Licenses. In addition to the foregoing, if there is a decision of the U.S. Copyright Office or a court, or any new legislation, inconsistent with Section 8.1, with the result that mechanical royalties are not required to be paid for some or all On-Demand Streams and/or Limited Downloads made through Covered Services, then the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be reduced to take into account such decision or legislation, based on actual usage under this Agreement to date, with the exact amount of such reduction to be agreed upon by the Parties promptly after such decision or legislation; provided that if any such decision is appealed and finally reversed on appeal, the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be restored, and Licensee shall promptly pay to HFA the total amount by which the supplementary Advance Payment was reduced in the interim.

4.3. HFA shall deposit Advance Payments into an interest-bearing bank account (with such interest being treated as part of the Advance Payment). HFA shall be free to distribute the initial and supplementary Advance Payments to HFA publisher-principals in accordance with a reasonable and nondiscriminatory methodology based on market share, actual usage or a per musical work payment (which methodology HFA shall provide to Licensee). Except insofar as it is recouped pursuant to Sections 4.4 and/or 4.5, the Advance Payment shall be nonrefundable.

4.4. Upon the final non-appealable determination of royalty rate(s) for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, the total amount of Advance Payments (including interest) shall be applied against undisputed amounts owed to HFA on behalf of its publisher-principals for On-Demand Streams and Limited Downloads made through Covered Services pursuant to Licenses issued under this Agreement. Such Advance Payments for these uses shall be applied to the account of Licensee. If the Advance Payments are not fully recouped at such time, any remainder of the Advance Payments thereafter shall be applied against all undisputed amounts owed to HFA on behalf of its publisher-principals by Licensee under mechanical licenses issued by HFA for On-Demand Streams and Limited Downloads made through Covered Services (including but not limited to Licenses under this Agreement), until such amount is fully recouped.

4.5. At the request of HFA, with Licensee's written consent, which consent shall not be withheld unreasonably, Advance Payments may be applied to other undisputed amounts (e.g., other mechanical royalties) owed by Licensee to HFA on behalf of its publisher-principals.

5. Royalty. The royalty rate (or rates) payable under a License shall be determined through negotiation and/or a CARP proceeding. The applicable rate(s) will be structured as determined through negotiation or by the CARP, and may (or may not) comprise separate royalty rate components for distinct uses of the musical works authorized by the Licenses. The Parties shall meet to negotiate royalty rates in good faith. HFA reserves its right to seek interest as a part of such determination of royalty rate(s). Licensee reserves its right to seek to have such royalty rate determination reflect any payments under foreign copyrights in the case where On-Demand Streams and/or Limited Downloads are transmitted to users outside of the United States. Whether royalty rates are determined by negotiation or a CARP, and regardless of how royalty rate categories may be denominated, the Parties shall seek a determination of royalty rates such

that it is clear what royalty rates are applicable to each of On-Demand Streams and Limited Downloads. Nothing in this Agreement shall be deemed to imply or indicate that there should or should not be a separate or discrete royalty rate applicable to the making of On-Demand Streams as part of the rate structure applicable to On-Demand Streams and Limited Downloads.

#### 6. Accounting and Payment.

6.1. Beginning with the issuance of a License, Licensee will be required to account to HFA in electronic form on a quarterly basis for activity under such License, 45 days after the close of each quarter, and specifically including the number of On-Demand Streams and Limited Downloads of each work made during such quarter (for the avoidance of doubt, such accountings shall include all On-Demand Streams and all Limited Downloads (if any) made through Licensee's "Send to a Friend" program). Such quarterly reports shall be in the form set forth in Exhibit B (as such form may reasonably be modified by HFA from time to time) and shall include, without limitation, a breakdown of On-Demand Streams and Limited Downloads made by Covered Services under Licenses in the applicable quarter, by musical work and delivery method code (indicating On Demand-Streams and/or Limited Downloads), and including ISRC number if available, catalog number if available and HFA license number if available (in the same manner indicated by Licensee in its License request) and shall also identify the specific retail outlet through which such On-Demand Streams and Limited Downloads were made. Licensee shall preserve all usage and financial data that reasonably should be expected to be relevant, upon the determination of royalty rates, to the calculation of royalties hereunder and use commercially reasonable efforts to do so for each Covered Service it operates hereunder. Subject to Article 4 and Section 3.3, upon the final non-appealable determination of royalty rate(s) for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, Licensee shall make the applicable payment for all previous quarters then completed, from the launch of the applicable Covered Services to date, within 45 days, to be accompanied by a cumulative statement setting forth and aggregating the information provided in the previous quarterly reports supplied under this Agreement. Thereafter, on a quarterly basis, 45 days after the close of each quarter, Licensee shall account to HFA for activities and/or revenues realized on such activities during such quarter as determined through negotiation and/or by regulation, providing such information as is required by regulation, a CARP, and/or a negotiated rate agreement, and, subject to Article 4 and Section 3.3, pay royalties at the applicable rate. Notwithstanding the foregoing, HFA reserves its right to seek more frequent access, including without limitation real-time access, to usage information.

6.2. At the request of HFA, Licensee shall accompany its quarterly reports with any available data in addition to that described in Section 6.1 concerning the numbers of On-Demand Streams and Limited Downloads made through Covered Services operated by Licensee (but not any personally identifying information), which data is regularly gathered or compiled by Licensee or provided to Licensee by its licensees with the legal right to disclose such data to HFA hereunder; provided that Licensee may provide any such data to HFA in whatever form it is available to Licensee in the ordinary course of its business and subject to any applicable confidentiality and other contractual use restrictions; and provided further that, before making any such request, HFA shall review with Licensee the types of such data Licensee has and can disclose to HFA, and the form in which such data is available, and HFA shall not request, and Licensee shall not be required to provide, data that (given the volume and form of such data, the degree to which such data is reflected in quarterly reports, the data processing

capabilities of HFA and Licensee, HFA's intentions to use such information, and other relevant factors) would not be commercially reasonable to provide. In addition, to the extent such information is available to Licensee and can be disclosed to HFA hereunder, at the request of HFA, Licensee shall accompany its quarterly reports with the total number of subscribers to and total number of subscriber months for each Covered Service operated by Licensee during the reporting period; provided that any such information relating to a Covered Service operated by Licensee shall be subject to an appropriate confidentiality restriction, and any such information provided to Licensee by a third party shall be subject to any applicable confidentiality and other contractual use restrictions.

7. Term. The term of this Agreement shall commence on the Effective Date and, subject to Sections 4.2 and 8.5, continue until the final non-appealable determination of royalty rate(s) for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding. New Licenses shall continue to be issued pursuant to this Agreement for the duration of such term. Thereafter, Licensee may request, and HFA shall issue, mechanical licenses covering On-Demand Streams and Limited Downloads at the applicable royalty rate(s) in accordance with its customary practices for the issuance of licenses where there is an applicable statutory rate, which the Parties currently understand to include the means of application described in Section 3.1. Notwithstanding the foregoing, Licenses once issued under this arrangement shall remain in effect unless terminated for default in respect to payment (once royalty rates are determined) or accounting (either before or after royalty rates are determined) pursuant to 17 U.S.C. § 115(c)(6) (or other applicable provision of law, if any), it being understood that a License may not be terminated for such a default where the default is remedied as provided in 17 U.S.C. § 115(c)(6). In addition, the provisions of Sections 4.2, 4.4 and 4.5, and of Articles 6, 7 and 10, shall survive the expiration or termination of this Agreement or any License under this Agreement.

8. Legal Framework for Agreement.

8.1. Subject to the other provisions of this Article 8, in order to avoid litigation and to provide assurance to Licensee in connection with the launch of its digital music services and enable HFA's issuance of license forms for Covered Services hereunder:

(a) The Parties agree that under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act. The Parties further agree that, under current law, the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of a DPD, and thus does not require a mechanical license. The foregoing does not express or imply any agreement that, and shall not be used to support any argument that, the process of making On-Demand Streams other than through Covered Services, or the process of making streams that would not qualify for a statutory license under Section 114(d)(2) of the Copyright Act (including, without limitation, because such streams are part of an "interactive service" (as that term is defined in Section 114(j)(7)) or exceed the "sound recording performance complement" (as that term is defined in

Section 114(j)(13)) does or does not involve the making and distribution of a DPD, and the Parties expressly reserve all their rights with respect to that issue.

(b) The Parties agree that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

(c) The Parties agree that under current law a compulsory license to make On-Demand Streams and Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the On-Demand Streams and Limited Downloads) is available under Section 115 of the Copyright Act.

8.2. Subject to Sections 8.3 and 8.5, for the term of this Agreement, no party to this Agreement and no Participating HFA Publisher shall take a position contrary to or inconsistent with Section 8.1, or lend support or resources, financial or otherwise, to any other person or entity taking a contrary or inconsistent position, before the Copyright Office, a CARP, a court or any other government office or tribunal. Thereafter, no party to this Agreement and no Participating HFA Publisher shall commence or lend support to any action in court to challenge the validity of the rates determined pursuant to Article 5 on the ground that On-Demand Streams and/or Limited Downloads do not involve the making or distribution of DPDs. It is understood that, for purposes of this Section 8.2, Licensee or Participating HFA Publishers shall not be deemed to lend financial support or resources to affiliated entities (i) merely through intra-enterprise financial arrangements in the ordinary course of business; (ii) merely by being a member or sitting on the board of directors of a trade association without actively lending support to or participating in any activities contrary to or inconsistent with Section 8.1; and/or (iii) merely by paying the membership dues or fees that a trade association ordinarily requires of its members. It is further understood that provided that Licensee is in compliance with this Section 8.2, Licensee shall not be in violation of this Agreement merely by belonging to a trade association that takes a position contrary to Section 8.1.

8.3. Notwithstanding Sections 8.1 and 8.2, the Parties and Participating HFA Publishers may at any time (1) raise and litigate (including, without limitation, before a CARP) the economic value of, and the appropriate royalty rate(s) to be applied to, On-Demand Streams and/or Limited Downloads; (2) take or support any position they choose with respect to sound recordings (as distinguished from any musical works embodied therein) and the rights therein, including, without limitation, rights under Sections 106 and 114 of the Copyright Act, and (3) make or lend support to any arguments they choose to prosecute, or defend or counterclaim against, an infringement claim relating to activities before the Effective Date. Notwithstanding Sections 8.1 and 8.2, Licensee may at any time make or lend support to any arguments they choose to defend or counterclaim against an infringement claim relating to activities on or after the Effective Date, in the event that a License with respect to the relevant works is not available hereunder (it being understood that, subject to Section 8.4, HFA and Participating HFA Publishers may participate in the litigation of any such claim, so long as their doing so is consistent with Sections 8.1 and 8.2). The Parties agree that they will act in good faith not to

induce, promote or encourage the litigation of an infringement claim relating to activities as described in the immediately preceding sentence.

8.4. To the extent that an action being litigated by Licensee involves the question of the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c) for a musical work for which a License is not available under this Agreement, HFA shall not participate in or lend support to such action. The Parties agree that they will act in good faith not to induce, promote or encourage litigation concerning the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c). For purposes of this Article 8, HFA shall include its parent National Music Publishers' Association, Inc.

8.5. To the extent that a final, non-appealable decision of the Copyright Office or a court, or any new legislation, is inconsistent with Section 8.1, this Agreement shall be inapplicable to the extent of the inconsistency as of the date thereof, but subject to Article 4, Licensee shall not be entitled to a refund of any monies paid prior to such date.

8.6. Nothing in this Article 8 shall be used by, or be enforceable by, a third party not a Party to this Agreement, in any manner or in any context, including without limitation in any legal proceeding. This Agreement does not give rise to any third party beneficiary rights in any party other than Participating HFA Publishers. The agreements set forth in this Article 8 and the course of dealing hereunder shall be inadmissible, and shall not be used to support any argument of law, in any litigation or arbitration relating to (1) activities before the Effective Date or (2) activities other than making and distributing On Demand Streams and Limited Downloads through Covered Services, except making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act.

## 9. Security.

9.1. Licensee shall incorporate, as part of the distribution of sound recordings embodying licensed works to users pursuant to this Agreement, a security technology, including, but not limited to, use of a digital rights management technology, for existing and prospective users that is designed to permit transmission to an end user in a secure manner (e.g., so as to prevent illicit copying).

9.2. To the extent the Covered Services use third-party technology in order to satisfy the requirements of Section 9.1, Licensee shall use its commercially reasonable efforts to maintain and upgrade such technology by monitoring any third-party announcement made available to Licensee of bug-fixes, security holes and functionality improvements, obtaining such upgrades, and installing and distributing such upgrades as reasonably necessary to maintain the integrity of the Covered Services.

9.3. Without limitation, Licensee shall properly implement security technologies and methods that are commercially acceptable to and generally equivalent to those generally used by the music industry to deliver On-Demand Streams and Limited Downloads of sound recordings embodying musical works in a secure manner through Covered Services, such that:

(a) in each case, the delivery or playback of a sound recording embodying a licensed work is reliably limited to the intended device or devices authenticated by the

Licensee as associated with a current subscriber (or, subject to all applicable terms and conditions of this Agreement, an identifiable potential subscriber) and only in accordance with the use limitation rules applicable to such sound recording; (b) all On-Demand Streams are protected to the extent commercially feasible so as to prevent software applications from being able to capture the streams to be saved for later rendering on any device;

(c) all Limited Downloads and On-Demand Streams shall only be transmitted to devices that fully and accurately support the security technologies used by the Covered Service, in order to accurately enforce the applicable use limitation rules, including, without limitation, the applicable time limits and playback limits imposed by Article 1;

(d) On-Demand Streams and Limited Downloads cannot be re-transmitted from the intended destination device to any other device, whether now known or hereafter invented, except where a sound recording is in a secure format that is unplayable on any such other device in any manner, whether now known or hereafter invented;

(e) the Licensee at all times maintains an accurate count of the number and type of transmissions (both On-Demand Streams and Limited Downloads) into user's devices from either the Covered Service directly or through the users' personal computer or other intermediate hosting device, whether now known or hereafter invented, the identity of the copyrighted work transmitted in each case, the applicable use limitation rule for such work, and all information necessary to fulfill the accounting requirements of Article 6 and any other obligations of Licensee under this Agreement.

9.4. In the event of a breach of any security technology(ies) used by Licensee to perform its obligations under this Article 9, or as otherwise set forth in this Agreement, Licensee shall use its commercially reasonable efforts to devise a solution to such security breach (or cause such solution to be devised and implemented) or alternatively, immediately cease all distribution of the licensed works. Licensee shall restore as quickly as possible the integrity of the security technologies used in the operation of Covered Services and shall keep HFA reasonably informed as to the status thereof.

9.5. Licensee shall not edit, alter or defeat any copyright protection technology or mechanism embedded in or associated with the sound recordings embodying the licensed works.

9.6. Licensee shall use commercially reasonable efforts to prevent the creation of any unauthorized copies of any licensed works in any facilities in its control in any form (including but not limited to, copies created by employees or contractors outside the immediate scope of their employment), and shall use its commercially reasonable efforts to prevent the creation of such unauthorized copies by any users. If Licensee learns of any material circumvention of the technology used to satisfy the requirements of Section 9.1 or of any material incident of unauthorized manufacture, advertising, distribution, lease or sale of the licensed works relating to a Covered Service (any of the foregoing an "Unauthorized Use"), Licensee shall promptly provide HFA with written notification of such Unauthorized Use and take all reasonable steps, and reasonably cooperate with HFA, to prevent such Unauthorized Use. Without limiting any other rights and remedies of HFA and its Licensors, if HFA learns, and

provides Licensee with reasonably credible evidence, that there are widespread, significant and substantial Unauthorized Uses, upon ten (10) days' notice by HFA, Licensee must, unless it secures its technology against such Unauthorized Uses to the satisfaction of HFA within the ten (10) day period, suspend all On-Demand Streams or Limited Downloads of the licensed works under this Agreement pending Licensee's securing its technology against such Unauthorized Uses to the reasonable satisfaction of HFA. Licensee will, on a quarterly basis, inform HFA of all known material breaches or attempted breaches of its security measures and Licensee's response to each of those breaches or attempted breaches.

#### 10. Royalty and Security Compliance.

10.1. Notwithstanding, without limiting and in addition to the general right pursuant to industry custom and practice of HFA and/or any Participating HFA Publisher to examine the books and records of Licensee in connection with Licensee's use of the Licensed Works, HFA shall be entitled, upon thirty (30) days' prior written notice to Licensee, to conduct, at the expense of HFA, an examination of the books, records, operations and security systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, payment and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than three (3) years following the termination of this Agreement.

10.2. During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that reasonably may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's quarterly reports and/or that reflect or summarize Licensee's quarterly reports; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's security systems (such information, along with the information described in the items (a)(i) and (a)(ii) of this Section 10.2, collectively referred to, as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, security systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Article 9. Licensee shall provide the information, systems access and personnel required by this Section 10.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business. At the request of Licensee, prior to commencing the Royalty and Security Examination, an outside examiner acting on behalf of HFA shall execute a nondisclosure agreement substantially in the form of Exhibit D hereto.



10.3. During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.

10.4. Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least three (3) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the reasonable satisfaction of HFA.

10.5. If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA. Any amount determined to be overpaid by Licensee shall be promptly credited to Licensee's Advance Payment account.

11. Data Access and Use Agreement. HFA shall have no obligation to perform its obligations hereunder unless and until Licensee enters into the Data and Access Use Agreement, attached hereto and incorporated herein as Exhibit C (the "Data Access and Use Agreement"), governing the nondisclosure and use of HFA Confidential Information (as defined in the Data Access and Use Agreement) by Licensee. To the extent Licensee seeks to have a third-party individual or entity obtain access to HFA Confidential Information for purposes of obtaining and administering Licenses and otherwise fulfilling its obligations under this Agreement (each, a "Third-Party Administrator"), Licensee must obtain HFA's prior consent of each such Third-Party Administrator (such consent not to be unreasonably withheld). Upon HFA's consent to Licensee's use of such Third-Party Administrator, HFA will require that such Third-Party Administrator enter into a data access and use agreement with HFA substantially in the form of the Data Access and Use Agreement, prior to allowing such Third-Party Administrator access to any HFA Confidential Information.

## 12. Miscellaneous.

12.1. Publicity. Licensee and HFA may issue a mutually agreed joint press release announcing this arrangement within a reasonable time period following the Effective Date. In HFA's communications to its members concerning this Agreement, HFA shall encourage its publisher principals to avail themselves of this Agreement.

12.2. Assignment. This Agreement shall be binding upon and inure to the benefit of all of the parties and their respective permitted successors and permitted assigns. Any assignment or transfer by Licensee of any of its rights or licenses under this Agreement shall require the prior written consent of HFA, which shall not be unreasonably withheld but which shall be subject to the approval of HFA's publisher-principals.

12.3. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to conflicts of law principles thereof).

12.4. Amendment. This Agreement may be modified or amended only by a writing signed by each of the Parties.

12.5. Entire Agreement. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

12.6. Counterparts. This Agreement may be executed in counterparts, including by means of facsimile, each of which shall be deemed to be an original, but which taken together shall constitute one agreement.

12.7. Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

12.8. Notices. All notices shall be in writing and shall be deemed given when (a) delivered personally; (b) upon receipt of a transmittal confirmation if sent by facsimile or like transmission with a copy by first class U.S. mail; or (c) upon delivery if sent by Federal Express, Express Mail or similar overnight courier service, to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number for a party as shall be specified by like notice):

if to HFA:

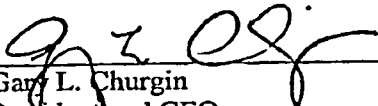
The Harry Fox Agency, Inc.  
711 Third Avenue  
New York, New York 10017  
Attention: General Counsel  
Telephone: (212) 922-3266  
Facsimile: (212) 922-3299

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if to Licensee:

Redacted

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

  
\_\_\_\_\_  
Gary L. Churgin  
President and CEO  
The Harry Fox Agency, Inc.

Redacted

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**EXHIBIT A**

[See attached]

# EXHIBIT A



## HFA/RIAA Electronic License Request & Output File Layout

### Acceptable Data Formats:

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

as of 4-1-04

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
3	Manufacturer Request Number	N	8	0	M
4	Label Name	A	15		M
5	ISRC Code	A	15		M
6	Playing Time - Minutes	N	3	0	M
7	Playing Time - Seconds	N	2	0	M
8	Artist	A	200		M
9	Song Title	A	200		M
10	AKA Song Title	A	200		O
11	ISWC Code	A	11		O
12	HFA Song Code	A	6		O
13	Song Writer(s)	A	200		C*
14	Publisher Name	A	60		C*
15	HFA Publisher Number	A	6		O
16	Publisher Share	N	7	4	O
17	Catalog Number	A	15		C*
18	Album (physical product) Title	A	200		C*
19	UPC Code	A	18		C*
20	Configuration Code	A	2		M
21	License Type	A	1		M
22	Server Expiration Date	N	8	0	M
23	Rate Code	A	1		C**
24	Rate in Cents	N	7	7	C**
25	Rate in Percentage of Statutory	N	5	2	C**
26	Rate in Percentage of Minimum Statutory	N	5	2	C**
27	HFA License Number	N	10		Output
28	HFA License Status Code #1	A	2		Input/Output
29	HFA Flag for Amended Publisher Data	A	1		Output
30	Publisher Status	A	1		Output
31	Total HFA Represented Share	N	7	4	Output
32	HFA License Status Code #2	A	2		Output
33	HFA License Status Code #3	A	2		Output
34	User Defined	A	30		Input/Output

### KEY:

### TYPE:

- A = Alphanumeric Field  
N = Numeric Field

**LENGTH:** For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required

**DECIMAL:** Number of characters after decimal (for numeric fields only)

### INPUT OPTION:

- M = Mandatory  
O = Optional  
C\* = Conditional — As agreed, label must provide either: (a) Songwriter or (b) Publisher, Catalog Number, Album Title and UPC. If (a) is provided, then (b) is not required; and vice versa.  
C\*\* = Conditional — One of the rate code fields from 23-26 must be completed

\*\* All input/output fields should be left blank upon initial license submission, EXCEPT for Field 28 which should be populated with the letter R in the Input file IF the record is a resubmission that has been amended.



## HFA/RIAA Electronic License File Field Definitions

as of 4-1-04

	Field	Type: Mandatory (M) Optional (O) Conditional (C)	Explanation	Example
1	Manufacturer Number	M	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	M	Date electronic license request submitted to HFA	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
3	Manufacturer Request Number	M	Unique Identifying number (numerical only) assigned by Licensee for each work for which a license is requested	12345678
4	Label Name	M	The name of the record label that produced the applicable recording	Epic
5	ISRC	M	Internal Standard Recording Code. ISRC code assigned to the recording by the record label.	USSM19804780
6	Playing Time - Minutes	M	The number of minutes in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 005
7	Playing Time - Seconds	M	The number of seconds in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 52
8	Artist	M	The name of the artist performing the applicable recording	Beatles
9	Song Title	M	Title of work for which a License is requested	Yesterday
10	A/K/A Song Title	O	Other names by which the work is known	Over the Rainbow; Somewhere Over the Rainbow
11	ISWC Code	O	International Standard Musical Work Code. Code assigned to works by the network of ISO/ISWC Local or Regional agencies	Example: T-034.524.680-1 Data Entered: T0345246801
12	HFA Song Code	O	Identifier assigned by HFA to identify a work uniquely	Example: Y12345
13	Songwriter(s)	C* Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of the composer(s) of the work.	Format: [First Name] [Last Name], [First Name], etc Example: Michael Ross, Tom Smith
14	Publisher Name	C* Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of publisher owning a share of the work. Additional publishers should be listed on separate lines using the same manufacturer's request number assigned to the work.	EMI Mills
15	HFA Publisher Number	O	Identifier assigned by HFA to identify a publisher uniquely.	P12345
16	Publisher Share	O	Percent of song owned by publisher.	Example: 66.667% Data Entered: 066.6670



## HFA/RIAA Electronic License File Field Definitions

as of 4-1-04

17	Catalog Number	C* Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album	The catalog number of a prior physical product that has been previously licensed (where applicable.)	12345-2
18	Album (physical product) Title	C* Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album	The title of a prior physical product that has been previously licensed (where applicable)	Parachute
19	UPC Code	C* Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album	The UPC code of a prior physical product that has been previously licensed (where applicable).	706301594728
20	Configuration Code	M	Code designating configuration type(s) applicable. Numerous options available; most relevant are in example column.	CV = Covered Services under the RIAA Agreement only FX = Server Fixation
21	License Type	M	Classification of license type requested.	G = Digital D = Physical Product (Domestic) I = Physical Product (Import)
22	Server Fixation Date	M	The date the applicable recording was or is expected to be fixed to the server for distribution via streaming or downloading.	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
23	Rate Code	C** One of the rate fields from 23 – 26 must be completed	Code designating type of rate applicable. Numerous options available; most relevant are in example column.	T = Statutory rate to be determined under RIAA Agreement S = Statutory (already determined) N = Negotiated
24	Rate in Cents	C** One of the rate fields from 23 – 26 must be completed	Rate indicated as a penny rate.	0.0755
25	Rate in Percentage of Statutory	C** One of the rate fields from 23 – 26 must be completed	Rate indicated in percentage of statutory.	75
26	Rate in Percentage of Minimum Statutory	C** One of the rate fields from 23 – 26 must be completed	Rate indicated in a percentage of minimum statutory.	75
27	HFA License Number	Output	Number assigned by HFA for each license	1010120001



## HFA/RIAA Electronic License File Field Definitions

as of 4-1-04

28	HFA License Status Code #1	Input/Output	<b>Input:</b> Use to designate amended record - use code R in field <b>Output:</b> Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	<b>Input:</b> R = indicates this record has been amended and is being resubmitted <b>Output:</b> 03 = Duplicate License Request (2nd Pass, Already Licensed, Part of Edit Validation Process)
29	HFA Flag for Amended Publisher Data	Output	Indicates that publisher information submitted by licensee differs on HFA database (for HFA represented publishers only)	Y = Flagged so that requestor can note that HFA publisher information differs from that submitted
30	Publisher Category Code	Output	Publisher Category Code.	Blank = Opt In HFA Publisher N = Non-HFA Publisher D = Opt In HFA Publisher, licensing direct to Licensee (i.e., affiliated with Licensee) B = Opt Out HFA Publisher, or Song blocked by Publisher
31	Total HFA Represented Share	Output	Total % of work represented by HFA	Example: 66.667% Data Entered: 066.6670
32	HFA License Status Code #2	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	03 = Duplicate license request (2nd Pass, Already Licensed, part of Edit Validation Process)
33	HFA License Status Code #3	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	03 = Duplicate License Request (2nd Pass, Already Licensed, Part of Edit Validation Process)
34	User Defined	Input/Output	This field is reserved for and defined by each record company. HFA will send back this information in the output file.	



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**EXHIBIT B**

[See attached]

## EXHIBIT B



### HFA/RIAA ELECTRONIC ROYALTY REPORT FILE LAYOUT

**Acceptable Data Formats:**

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

85 of 4-1-04

#### FILE HEADER (Control Portion for File Transfer)

Line Count	15	0	Number	Yes	Number of lines of data in file; used as control to verify complete and accurate file copy was received.	321456
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#### FILE BODY

	Field Name	Field Length**	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Yes	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	8	0	Number	Yes	Date electronic royalty report submitted to HFA. Format: YYYYMMDD	20010304 (3/4/2001)
3	Royalty Reporting Period	6		Text	Yes	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	030601 (i.e., quarterly reporting period, ending the 6th month of 2001.)
4	HFA License Number	12		Text	Yes	HFA License Number	1010610541
5	ISRC	15		Text	Conditional	International Standard Recording Code. Either the ISRC Code or UPC Code must be submitted.	USEM39700174
6	UPC	16		Text	Conditional	UPC Code. Either the ISRC Code or the UPC Code must be submitted.	706301694728
7	Configuration Code	2		Text	Yes	Code designating the specific format or medium licensed	SP
8	HFA Song Title	30		Text	Yes	Title of work being licensed	Yesterday
9	Manufacturer Request Number	15		Text	Yes	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested.	54321
10	Sales Channel	5		Text	Conditional	Field specifying the specific sales channel through which the content was delivered (i.e.: CD burn) S = Stream; TL = Time Limited Download; UL = Use Limited Download	S
11	Units (For Period)	9	0	Number	Yes	Applicable number of units sold under license number reported in Field #4 above for the Distribution Service reported in Field #16.	4
12	Units (To Date)	9	0	Number	Yes	Applicable number of units sold to date under license number reported in Field #4 above for the Distribution Service reported in Field #16..	12345
13	Royalty Rate	5	4	Numeric	Yes	Applicable payment per unit	0.85
14	Royalty Amount (For Period)	11	4	Numeric	Yes	Units Sold X Royalty Rate determined in Field #13	.85
15	Royalty Amount (To Date)	11	4	Numeric	Yes	Total Royalties Generated To Date for license number reported in Field #4 above for the Distribution Service reported in Field #16.	54.32
16	Service (i.e., Third Party)	30		Text	Conditional	Third party service through which the unit sold under license number reported in Field #4 was distributed (i.e.: Apple, CDBaby, etc.)	MUSICSERVICE.COM

\*\* Any characters or digits exceeding these per field maximums will be truncated.  
Note: Please use UPPERCASE for all data entries.

**EXHIBIT C**

[See attached]

## EXHIBIT C

## Data Access and Use Agreement

This Data Access and Use Agreement ("Agreement") is entered into as of July 23, 2004, by and between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and Redacted, a Washington corporation with an office at Redacted ("Recipient").

WHEREAS, Recipient (also referred to at times herein as "Licensee") and HFA have entered, or expect to enter, into a license agreement (the "License Agreement"), pursuant to which HFA has granted, or will grant, limited rights to certain copyrighted musical compositions (each, a "Musical Work") in connection with the operation of Licensee's digital music subscription service; and

WHEREAS, Recipient seeks to access and use certain HFA Confidential Information (defined in Section 1 below) in order to obtain, exercise the benefit of, and administer the licenses issued under the License Agreement (each, a "License"), and as otherwise may be necessary to comply with Licensee's obligations under the License Agreement (collectively, the "Purpose"), and HFA has agreed to allow Recipient such limited access to and use of the HFA Confidential Information solely as necessary to accomplish the Purpose;

NOW THEREFORE, in consideration of the premises of and the mutual promises, covenants and agreements contained in this Agreement, HFA and Recipient agree as follows:

**1. HFA Confidential Information.**

"HFA Confidential Information" means any and all information and material disclosed by HFA to Recipient or obtained by Recipient from HFA (whether in writing, or in oral, graphic electronic or any other form) that is proprietary and/or is intended by HFA to remain confidential relating to HFA's business and its databases, products, services, business strategies, capabilities or business affairs, including without limitation, all data and information related to the Musical Works and ownership thereof and/or HFA's publisher-principals.

**2. Non-Disclosure and Limited Use.**

Recipient covenants (a) to hold all HFA Confidential Information in strict confidence, (b) that it shall disclose (or permit access to) the HFA Confidential Information solely to (or by) its employees, if any, who need to know or access such HFA Confidential Information to accomplish the Purpose, and who are bound by nondisclosure and use restrictions and obligations comparable to and at least as restrictive to those set forth herein, and (c) that it shall not disclose to any third party, including any agent, contractor, consultant or other party or permit any such party to access, the HFA Confidential Information, unless and until such party has entered into a written agreement with HFA in form and substance of this Agreement governing the nondisclosure and use of the HFA Confidential Information. Notwithstanding the foregoing clause (c), an individual person (but not an entity) engaged by Recipient on an independent contractor basis who is not assigned a task involving manipulation of HFA Confidential Information and has only infrequent, incidental contact with insignificant amounts of HFA Confidential Information shall not be required to enter into such a written agreement with HFA; provided, however, that before having any contact with HFA Confidential Information, such contractor has entered into a suitable written confidentiality agreement with Recipient that precludes the disclosure of HFA Confidential Information to any third party (either expressly or by means of a blanket prohibition that effectively covers HFA Confidential Information); and further provided that Recipient shall be liable to HFA for any disclosure of HFA Confidential Information by such contractor that would violate of the terms of this Agreement. Recipient further covenants that it shall (y) use HFA Confidential Information solely as necessary to accomplish the Purpose, and (z) not extract, aggregate, derive or copy any HFA Confidential Information, whether by bulk transfer or through individual data query and response, for use or incorporation in any database, unless the sole purpose of such use or incorporation is to accomplish the Purpose. Recipient agrees to notify HFA immediately upon obtaining any information regarding unauthorized disclosure or access to the HFA Confidential Information.

Notwithstanding the disclosure and use restrictions in this Section 2 and in reference to Section 1, Recipient may disclose HFA Confidential Information (i) that is independently derived or acquired from a party not subject to a duty of confidentiality to HFA, or (ii) to the extent required to respond to the request of a court of competent jurisdiction, provided that upon receiving any such request and to the extent that it may do so without violating any law, Recipient prior to such disclosure advises HFA of such request in order that HFA may take such action as it deems appropriate to protect the HFA Confidential Information. During the Term (defined in Section 5 below) and for a period of eight (8) years following the termination or expiration of this Agreement, Recipient agrees to permit HFA (or an agent acting on behalf of HFA) to inspect, on an annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Confidential Information is (or was) used in Recipient's facilities, if any, and to furnish whatever assistance is reasonably necessary to permit HFA (or its agent) to determine whether Recipient, including its employees, agents, subcontractors, independent contractors, consultants or other parties, if any, are in compliance with this Agreement. If HFA employs an agent for this purpose, at the request of Recipient, such agent shall execute a nondisclosure agreement substantially in the form of Exhibit C-1 hereto.

**3. Ownership.**

Recipient acknowledges and agrees that all right, title and interest in and to the HFA Confidential Information (including all copies, extracts and portions thereof) is and shall remain the sole property of HFA. Recipient does not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights under this Agreement or any disclosure or access hereunder, except the limited right to use such HFA Confidential Information in strict accordance with the express provisions of this Agreement. All rights relating to the HFA Confidential Information that are not expressly granted hereunder to Recipient are reserved and retained by HFA.

**4. No Warranty; Limitation of Liability.**

EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE HFA CONFIDENTIAL INFORMATION OR ANY USE THEREOF, AND THE HFA CONFIDENTIAL INFORMATION IS PROVIDED ON AN "AS IS" BASIS. EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA HEREBY EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES, INCLUDING, BUT NOT LIMITED TO, CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA CONFIDENTIAL INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA CONFIDENTIAL INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT, EVEN IF HFA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

**5. Term; Termination.**

This Agreement will continue for the term of the License Agreement (including any agreed extensions thereof) (the "Term"), unless otherwise terminated by HFA in accordance herewith. HFA may terminate this Agreement at any time upon written notice, and shall have no further obligations to disclose to or permit access by Recipient to any HFA Confidential Information; and provided, however, that each party's rights and obligations shall otherwise survive the termination or expiration of this Agreement.

**6. Purging of HFA Confidential Information.**

Promptly following any expiration or termination of this Agreement, Recipient shall purge and destroy any and all records and copies of HFA Confidential Information from any Recipient databases and other systems under Recipient's direct or indirect control, and any other media on which any HFA Confidential Information may have been provided, together with all copies thereof, whether in printed or machine readable form; provided, however,

that Recipient may retain any records and copies of HFA Confidential Information (i) solely to the extent and for the period necessary to permit Licensee to fulfill any further obligations under the License Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6; and/or (ii) solely to the extent (if any) and for the period (if any) required to comply with applicable law (including federal or state tax law), after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

**7. Assistance of Counsel.**

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

**8. Specific Performance.**

Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

**9. Miscellaneous.**

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By: Jacqueline C. Chaberski  
Name: Jacqueline C. Chaberski  
Title: SVP & General Counsel

Redacted

Exhibit C-1

[DATE]

[ADDRESSEE]

[LICENSEE]

[ADDRESS]

[ADDRESS]

Re: Inspection of LICENSEE

To Whom It May Concern:

We have been requested by The Harry Fox Agency, Inc. ("HFA") to inspect the facilities of RECIPIENT in connection with RECIPIENT'S use of HFA Confidential Information as defined in, and pursuant to, that certain Data Access and Use Agreement ("Exhibit C") entered into by RECIPIENT as of \_\_\_\_\_.

We agree that, except as authorized in writing by RECIPIENT, we will not disclose to anyone other than HFA, its officers and employees, legal counsel, and HFA-affiliated publishers, any information that we obtain from our inspection of RECIPIENT's facilities; provided, however, that we may disclose such information in the context of a legal action or proceeding, and further provided that it is understood that HFA and its affiliated publishers may disclose such information as they deem appropriate and necessary.

Sincerely,

[AUTHORIZED AGENT OF HFA]

on behalf of

[AGENT'S FIRM]

**EXHIBIT D**

**Royalty/Security Examiner NDA**

[DATE]

[ADDRESSEE]

[LICENSEE]

[ADDRESS]

[ADDRESS]

Re: Royalty Examination of LICENSEE (EXAM PERIOD)  
Security Examination of LICENSEE

To Whom It May Concern:

We have been requested by The Harry Fox Agency, Inc. ("HFA") to examine, commencing on DATE, the books and records of LICENSEE for the period EXAM PERIOD in connection with LICENSEE'S royalty reports and payments to HFA-affiliated publishers. We have also been requested by HFA to examine LICENSEE'S operations and security systems to determine LICENSEE'S compliance with its security obligations under one or more licensing agreements with HFA.

We agree that, except as authorized in writing by LICENSEE, we will not disclose to anyone other than HFA, its officers and employees, legal counsel, and HFA-affiliated publishers, any information that we obtain from our examination of LICENSEE's books, records, operations or security systems; provided, however, that we may disclose such information in the context of a legal action or proceeding, and further provided that it is understood that HFA and its affiliated publishers may disclose such information as they deem appropriate and necessary.

Sincerely,

[AUTHORIZED EXAMINER]

on behalf of

[EXAMINER'S FIRM]



**EXHIBIT CO 0033**

## Data Access and Use Agreement

This Data Access and Use Agreement ("Agreement") is entered into as of July 2, 2004, by and between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and **Redacted** a California corporation with an office at **Redacted** ("Recipient").

WHEREAS, Recipient (also referred to at times herein as "Licensee") and HFA have entered, or expect to enter, into that certain Commercial Background Music Licensing Agreement, dated as of December 9, 2003 (the "License Agreement"), pursuant to which HFA has granted, or will grant, limited rights to certain copyrighted musical compositions (each, a "Musical Work") in connection with the operation of Licensee's commercial background music service; and

WHEREAS, Recipient seeks to access and use certain HFA Confidential Information (defined in Section 1 below) as necessary to obtain and administer the licenses issued under the License Agreement (each, a "License"), and as otherwise may be necessary to comply with Licensee's obligations under the License Agreement (collectively, the "Purpose"), and HFA has agreed to allow Recipient such limited access to and use of the HFA Confidential Information solely as necessary to accomplish the Purpose;

NOW THEREFORE, in consideration of the premises of and the mutual promises, covenants and agreements contained in this Agreement, HFA and Recipient agree as follows:

### 1. HFA Confidential Information.

"HFA Confidential Information" means any and all information and material disclosed by HFA to Recipient or obtained by Recipient from HFA (whether in writing, or in oral, graphic electronic or any other form) that is proprietary and/or is intended by HFA to remain confidential relating to HFA's business and its databases, products, services, business strategies, capabilities or business affairs, including without limitation, all data and information related to the Musical Works and ownership thereof and/or HFA's publisher-principals.

### 2. Non-Disclosure and Limited Use.

Recipient covenants (a) to hold all HFA Confidential Information in strict confidence, (b) that it shall disclose (or permit access to) the HFA Confidential Information solely to (or by) its employees, if any, who need to know or access such HFA Confidential Information to accomplish the Purpose, and who are bound by nondisclosure and use restrictions and obligations comparable to and at least as restrictive to those set forth herein, and (c) that it shall not disclose to any third party, including any agent, contractor, consultant or other party, or permit any such party to access, the HFA Confidential Information, unless and until such party has entered into a written agreement with HFA in form and substance of this Agreement governing the nondisclosure and use of the HFA Confidential Information. Recipient further covenants that it shall (y) use HFA Confidential Information solely as necessary to accomplish the Purpose, and (z) not extract, aggregate, derive or copy any HFA Confidential Information, whether by bulk transfer or through individual data query and response, for use or incorporation in any database, unless the sole purpose of such use or incorporation is to accomplish the Purpose. Recipient agrees to notify HFA immediately upon obtaining any information regarding unauthorized disclosure or access to the HFA Confidential Information.

Notwithstanding the disclosure and use restrictions in this Section 2, Recipient may disclose HFA Confidential Information (i) that is independently derived or acquired from a party not subject to a duty of confidentiality to HFA, or (ii) to the extent required to respond to the request of a court of competent jurisdiction, provided that upon receiving any such request and to the extent that it may do so without violating any law, Recipient prior to such disclosure advises HFA of such request in order that HFA may take such action as it deems appropriate to protect the HFA Confidential Information. During the Term (defined in Section 5 below) and for a period of three (3) years following the termination or expiration of this Agreement, Recipient agrees to permit HFA to

inspect, on a semi-annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Confidential Information is (or was) used in Recipient's facilities, if any, and to furnish whatever assistance is reasonably necessary to permit HFA to determine whether Recipient, including its employees, agents, subcontractors, independent contractors, consultants or other parties, if any, are in compliance with this Agreement.

### 3. Ownership.

Recipient acknowledges and agrees that all right, title and interest in and to the HFA Confidential Information (including all copies, extracts and portions thereof) is and shall remain the sole property of HFA. Recipient does not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights under this Agreement or any disclosure or access hereunder, except the limited right to use such HFA Confidential Information in strict accordance with the express provisions of this Agreement. All rights relating to the HFA Confidential Information that are not expressly granted hereunder to Recipient are reserved and retained by HFA.

### 4. No Warranty; Limitation of Liability.

EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE HFA CONFIDENTIAL INFORMATION OR ANY USE THEREOF, AND THE HFA CONFIDENTIAL INFORMATION IS PROVIDED ON AN "AS IS" BASIS. EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA HEREBY EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES, INCLUDING, BUT NOT LIMITED TO, CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA CONFIDENTIAL INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA CONFIDENTIAL INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT, EVEN IF HFA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

### 5. Term; Termination.

This Agreement will continue for the term of the License Agreement (including any agreed extensions thereof) (the "Term"), unless otherwise terminated by HFA in accordance herewith. HFA may terminate this Agreement at any time upon written notice, and shall have no further obligations to disclose to or permit access by Recipient to any HFA Confidential Information; and provided, however, that each party's rights and obligations shall otherwise survive the termination or expiration of this Agreement.

### 6. Purging of HFA Confidential Information.

Promptly following any expiration or termination of this Agreement, Recipient shall purge and destroy any and all records and copies of HFA Confidential Information from any Recipient databases and other systems under Recipient's direct or indirect control, and any other media on which any HFA Confidential Information may have been provided, together with all copies thereof, whether in printed or machine readable form; provided, however, that Recipient may retain any records and copies of HFA Confidential Information solely to the extent and for the period necessary to permit Licensee to fulfill any further obligations under the License Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not

required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

7. Assistance of Counsel.

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

8. Specific Performance.

Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and/or 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

9. Miscellaneous.

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By: 

Name: Jacqueline C. Chukwura

Title: SVP & General Counsel

Redacted

**EXHIBIT CO 0034**

\* 1110

COPY  
cert file  
10/5/04

RINGTONE SERVICE  
LICENSING AGREEMENT

This agreement ("Agreement") is entered into as of July 1, 2004 ("Effective Date") by and between **Redacted** ("Licensee"), a Delaware corporation with an office at **REDACTED**, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged; the parties hereto agree as follows:

1. Licensing

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in

connection with the Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed sixty (60) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than sixty (60) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-

Principal at any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires. Notwithstanding anything to the contrary set forth above, at Licensee's request HFA shall initially offer only those ten (10) Publisher-Principals set forth in Exhibit D to this Agreement the opportunity to make their Musical Works available under this Agreement. Licensee may request in writing that HFA offer additional Publisher-Principals such opportunity, and subject to Licensee's payment of the applicable administrative fees as set forth in Subsection 10.1 of this Agreement, HFA shall offer such additional Publisher-Principals the opportunity to make their Musical Works available under this Agreement in the same manner as described in this Subsection 1.2.

- 1.3 Following execution of this Agreement and conclusion of the applicable Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights or right to alter the fundamental character of a Musical Work (except to reproduce and distribute Ringtones, in strict accordance with the terms and



conditions of this Agreement); (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.

- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to a wholly owned subsidiary or affiliate of Licensee..

2. **Reporting and Payment of Royalties**

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

3. **Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2005 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

4. **Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

5. **Security**

- 5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

- 5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four

(24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.

5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.

## 6. Royalty and Security Compliance

6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is substantially not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.

6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensee's Statements;

(ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information, along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 7. **Representations and Warranties; Disclaimer; Indemnity**
  - 7.1 Licensee represents and warrants that: (a) it has the full right, power and authority to enter into and perform this Agreement in accordance with its

terms and conditions; (b) it shall take all steps necessary to implement and shall comply with (i) its security obligations set forth in Section 5, and (ii) the requirements set forth in Section 9; and (c) the Service shall (i) neither infringe upon nor violate the intellectual property rights or other rights of any third party, and (ii) comply with all applicable laws, rules and regulations.

- 7.2 HFA represents and warrants that it has the full right, power and authority to enter into this Agreement and perform its obligations hereunder.
- 7.3 Licensee agrees to indemnify, defend and hold harmless HFA from and against any losses, injuries, damages, claims, expenses and costs (including without limitation reasonable attorneys' fees) incurred or suffered by HFA, arising from any third-party actions, claims, suits or legal proceedings of any kind, caused by, incident to or arising out of Licensee's failure to perform any of its obligations under this Agreement and/or breach of any of Licensee's representations, warranties or covenants hereunder.

#### 8. Termination/Default

- 8.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.
- 8.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that in the event that (a) Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act;

(b) Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations or restrictions imposed by Subsections 1.1, 1.5, 1.6 and 10.4 and Sections 2, 5, 6, 7, 9 of this Agreement shall be considered a material breach of, and default under, this Agreement.

8.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; (e) Licensee's insolvency; or (f) Licensee's inability to pay its debts as they become due. Upon the occurrence of any of the events described in items (a) through (f) of this Subsection 8.3, notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

8.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 8.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.

85 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5, 6, 7, 8, 9 and 10 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.

## 9. Proprietary and Confidential Information

- 9.1 HFA shall have no obligation to perform its obligations hereunder unless and until Licensee enters into the Data Access and Use Agreement, attached hereto and incorporated herein as Exhibit C (the "Data Access and Use Agreement"), governing the nondisclosure and use of HFA Confidential Information (as defined in the Data Access and Use Agreement) by Licensee.
- 9.2 To the extent Licensee seeks to have a third-party individual or entity obtain access to HFA Confidential Information for purposes of obtaining and administering Licenses and otherwise fulfilling its obligations under this Agreement (each, a "Third-Party Administrator"), Licensee must obtain HFA's prior consent of each such Third-Party Administrator (such consent not to be unreasonably withheld). Upon HFA's consent to Licensee's use of such Third-Party Administrator, HFA will require that such Third-Party Administrator enter into a data access and use agreement with HFA substantially in the form of the Data Access and Use Agreement, prior to allowing such Third-Party Administrator access to any HFA Confidential Information.

10. Miscellaneous

- 10.1. Administrative Fee. In addition to the royalties payable hereunder, within five (5) business days following execution of this Agreement, Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the initial Opt-In Period and licensing processes contemplated hereunder for those Publisher-Principals identified in Exhibit D. If Licensee requests that HFA offer up to an additional ten (10) Publisher-Principals the opportunity to make their Musical Works available under this Agreement, Licensee shall pay to HFA an additional three thousand five hundred dollars (\$3,500) in consideration of HFA's administrative expenses in connection with the additional Opt-In Period and licensing processes associated with same. If Licensee requests that HFA offer any number of additional Publisher-Principals (through and including all remaining Publisher-Principals) the opportunity to make their Musical Works available under this Agreement, Licensee shall pay to HFA an additional three thousand dollars (\$3,000) in consideration of HFA's administrative expenses in connection with the additional Opt-In Period and licensing processes associated with same.
- 10.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

To the address set forth above. Attn:

**Redacted**

- 10.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.
- 10.4 Assignment. This Agreement may not be assigned.
- 10.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 10.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 10.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 10.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 10.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.



10.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

**Redacted**

THE HARRY FOX AGENCY, INC.

By: 

Print name: Jacqueline C. Charlesworth

Title: SVP & General Counsel

# Exhibit A



## Ringtone Electronic License Request & Output File Layout

### Acceptable Data Formats:

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

Description	Type	Length	Decimal	Input Option
1 Manufacturer Number	A	6		M
2 Transaction Date	N	8	0	M
3 Manufacturer Request Number	N	8	0	M
4 Ringtone Playing Time - Seconds	N	2	0	M
5 Song Title	A	200		M
6 AKA Song Title	A	200		O
7 ISWC Code	A	11		O
8 HFA Song Code	A	6		O
9 Song Writer(s)	A	200		M
10 Publisher Name	A	60		O*
11 HFA Publisher Number	A	6		Input/Output
12 Publisher Share	N	7	4	Input/Output
13 Catalog Number (for matching purposes only)	A	15		O
14 Configuration Code(s)	A	12		M
15 UPC Code (for matching purposes only)	A	16		O
16 License Type	A	1		M
17 Server Expiration Date	N	8	0	M
18 Rate Code	A	1		M
19 Rate In Cents	N	7	7	M
20 Artist Name (For Pre-Recorded Ringtone)	A	60		C*
21 Album Title (For Pre-Recorded Ringtone)	A	200		C*
22 Record Label (For Pre-Recorded Ringtone)	A	60		C*
23 Total Playing Time - Minutes (For Pre-Recorded Ringtone)	N	3	0	C*
24 Total Playing Time - Seconds (For Pre-Recorded Ringtone)	N	2	0	C*
25 ISRC Code (For Pre-Recorded Ringtones)	A	15		C*
26 User Defined	A	30		Input/Output
27 HFA License Number	N	10		Output
28 HFA License Status Code	A	2		Input/Output
29 HFA License Status Code:1	A	2		Output
30 HFA License Status Code:2	N	2		Output
31 HFA Flag for Amended Publisher Data	A	1		Output
32 Publisher Status	A	1		Output

### KEY:

#### TYPE:

- A = Alphanumeric Field
- N = Numeric Field

LENGTH: For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required.

DECIMAL: Number of characters after decimal (for numeric fields only)

#### INPUT OPTION:

- M = Mandatory
- O = Optional
- O\* = Optional, however, providing this information will greatly help expedite the licensing process if the song was released within the last six months.
- C\* = Conditional Information mandatory if request is for a Pre-Recorded Ringtone.

\*\* All input/output fields should be left blank upon initial license submission, EXCEPT for Field 28 which should be populated with the letter R in the input file IF the record is a resubmission that has been amended.

## Exhibit B



### Ringtone Electronic Royalty Reporting File Layout

Acceptable file formats are:

- 1 MS Excel spreadsheet - please save it as type "csv" (comma separated values)
- 2 ASCII text either in a delimited (csv) or fixed width format (.txt)

#### FILE HEADER (Control Portion for File Transfer)

Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
Line Count	15	0	Number	Yes	Number of lines of data in file; used as control to verify complete and accurate file copy was received.	321456

#### FILE BODY

	Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Yes	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	8	0	Number	Yes	Date electronic royalty report submitted to HFA Format: YYYYMMDD	20020004
3	Royalty Reporting Period	6		Text	Yes	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	30602
4	HFA License Number	12		Text	Yes	Number assigned by HFA for each license	1012345678
5	Configuration Code	2		Text	Yes	Code designating the specific configuration licensed (FX, PH, RR). FX - Initial Server Fixation PH - Phonic Ringtone RR - Pre-Recorded Ringtone IMPORTANT NOTE: Each configuration must be reported as a separate line.	PH
6	Song Title	30		Text	Yes	Title of work for which a license was granted.	STARFURY NIGHT
7	Units (For Period)	9	0	Number	Yes	Applicable number for each specific configuration shown in field #5	12345
8	Publisher Name	30		Text	Yes**	Name of the publisher owning a share of the work	Famous
9	Publisher Ownership Share Percentage	7	4	Number	Yes**	Percent of song owned by specific publisher, as provided to licensee on license	33.3340
10	Royalty Rate	5	4	Numeric	Yes**	Royalty rate for each specific configuration shown in field #5	0.1000
11	Royalty Amount (For Period)	11	4	Numeric	Yes	Total royalties generated this period for this license.	1.2500
12	Service (ie: Third Party)	30		Text	Yes	Third party service through which the content was distributed (Each third party Service must be reported on a separate line)	RINGTONES.COM

Note: Any characters or digits exceeding these per field maximums will be truncated.

Note: You must report by configuration(s) and units for each third party service through which content was distributed. See sample report for exam

\*\* A separate publisher share % line with corresponding publisher name must be given for each ringtone configuration if the title is not 100% payable through HFA

## EXHIBIT C

### Data Access and Use Agreement

This Data Access and Use Agreement ("Agreement") is entered into as of July 1, 2004, by and between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and **Redacted**, a Delaware corporation with an office at **Redacted** ("Recipient").

WHEREAS, Recipient (also referred to at times herein as "Licensee") and HFA have entered, or expect to enter, into that certain Ringtone Service Licensing Agreement, dated as of July 1, 2004 (the "License Agreement"), pursuant to which HFA has granted, or will grant, limited rights to certain copyrighted musical compositions (each, a "Musical Work") in connection with the operation of Licensee's ringtones service; and

WHEREAS, Recipient seeks to access and use certain HFA Confidential Information (defined in Section 1 below) as necessary to obtain and administer the licenses issued under the License Agreement (each, a "License"), and as otherwise may be necessary to comply with Licensee's obligations under the License Agreement (collectively, the "Purpose"), and HFA has agreed to allow Recipient such limited access to and use of the HFA Confidential Information solely as necessary to accomplish the Purpose;

NOW THEREFORE, in consideration of the premises of and the mutual promises, covenants and agreements contained in this Agreement, HFA and Recipient agree as follows:

#### 1. HFA Confidential Information.

"HFA Confidential Information" means any and all information and material disclosed by HFA to Recipient or obtained by Recipient from HFA (whether in writing, or in oral, graphic electronic or any other form) that is proprietary and/or is intended by HFA to remain confidential relating to HFA's business and its databases, products, services, business strategies, capabilities or business affairs, including without limitation, all data and information related to the Musical Works and ownership thereof and/or HFA's publisher-principals.

#### 2. Non-Disclosure and Limited Use.

Recipient covenants (a) to hold all HFA Confidential Information in strict confidence, (b) that it shall disclose (or permit access to) the HFA Confidential Information solely to (or by) its employees, if any, who need to know or access such HFA Confidential Information to accomplish the Purpose, and who are bound by nondisclosure and use restrictions and obligations comparable to and at least as restrictive to those set forth herein, and (c) that it shall not disclose to any third party, including any agent, contractor, consultant or other party, or permit any such party to access, the HFA Confidential Information, unless and until such party has entered into a written agreement with HFA in form and substance of this Agreement governing the nondisclosure and use of the HFA Confidential Information. Recipient further covenants that it shall (y) use HFA Confidential Information solely as necessary to accomplish the Purpose, and (z) not extract, aggregate, derive or copy any HFA Confidential Information, whether by bulk transfer or through individual data query and response, for use or incorporation in any database, unless the sole purpose of such use or incorporation is to accomplish the Purpose. Recipient agrees to notify HFA immediately upon obtaining any information regarding unauthorized disclosure or access to the HFA Confidential Information.

Notwithstanding the disclosure and use restrictions in this Section 2, Recipient may disclose HFA Confidential Information (i) that is independently derived or acquired from a party not subject to a duty of confidentiality to HFA, or (ii) to the extent required to respond to the request of a court of competent jurisdiction, provided that upon receiving any such request and to the extent that it may do so without violating any law, Recipient prior to such

disclosure advises HFA of such request in order that HFA may take such action as it deems appropriate to protect the HFA Confidential Information. During the Term (defined in Section 5 below) and for a period of three (3) years following the termination or expiration of this Agreement, Recipient agrees to permit HFA to inspect, on a semi-annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Confidential Information is (or was) used in Recipient's facilities, if any, and to furnish whatever assistance is reasonably necessary to permit HFA to determine whether Recipient, including its employees, agents, subcontractors, independent contractors, consultants or other parties, if any, are in compliance with this Agreement.

### **3. Ownership.**

Recipient acknowledges and agrees that all right, title and interest in and to the HFA Confidential Information (including all copies, extracts and portions thereof) is and shall remain the sole property of HFA. Recipient does not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights under this Agreement or any disclosure or access hereunder, except the limited right to use such HFA Confidential Information in strict accordance with the express provisions of this Agreement. All rights relating to the HFA Confidential Information that are not expressly granted hereunder to Recipient are reserved and retained by HFA.

### **4. No Warranty; Limitation of Liability.**

EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE HFA CONFIDENTIAL INFORMATION OR ANY USE THEREOF, AND THE HFA CONFIDENTIAL INFORMATION IS PROVIDED ON AN "AS IS" BASIS. EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA HEREBY EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES, INCLUDING, BUT NOT LIMITED TO, CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA CONFIDENTIAL INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA CONFIDENTIAL INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT, EVEN IF HFA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

### **5. Term; Termination.**

This Agreement will continue for the term of the License Agreement (including any agreed extensions thereof) (the "Term"), unless otherwise terminated by HFA in accordance herewith. HFA may terminate this Agreement at any time upon written notice, and shall have no further obligations to disclose to or permit access by Recipient to any HFA Confidential Information; and provided, however, that each party's rights and obligations shall otherwise survive the termination or expiration of this Agreement.

### **6. Purging of HFA Confidential Information.**

Promptly following any expiration or termination of this Agreement, Recipient shall purge and destroy any and all records and copies of HFA Confidential Information from any Recipient databases and other systems under Recipient's direct or indirect control, and any other media on which any HFA Confidential Information may have been provided, together with all copies thereof, whether in printed or machine readable form; provided, however, that Recipient may retain any records and copies of HFA Confidential Information solely to the extent and for the

period necessary to permit Licensee to fulfill any further obligations under the License Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

**7. Assistance of Counsel.**

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

**8. Specific Performance.**

Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and/or 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

**9. Miscellaneous.**

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By: 

Name: J.C. Chaudhary

Title: SVP, General Counsel

Redacted

## EXHIBIT D

- 1) A. Schroeder
- 2) Cal IV Songs
- 3) Carl Fischer
- 4) Devon Music
- 5) Windswept
- 6) Casa David
- 7) Criterion
- 8) Big Elk
- 9) Ram Z Music
- 10) Curb Music

**EXHIBIT CO 0035**



DIGITAL JUKEBOX SERVICE  
LICENSING AGREEMENT

This agreement ("Agreement") is entered into as of May 20, 2004 ("Effective Date") by and between **Redacted** ("Licensee"), a  
an office at **REDACTED**; The Harry Fox  
Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue,  
New York, NY 10017; and, with respect to Section 10.2 only, **Redacted**  
("Guarantor"), a **REDACTED**

WHEREAS, Licensee owns and operates a service pursuant to which copyrighted musical compositions (each, a "Musical Work") are either digitally reproduced on proprietary digital jukebox units destined for or located in public and/or commercial establishments (each, a "DJU") or on a central computer server or servers, from which such Musical Works are subsequently transmitted and downloaded to DJUs for the purpose of making available such Musical Works solely for playback and on-site listening in such establishments ("Service");

WHEREAS, in order to operate the Service, Licensee seeks licenses to reproduce, digitally transmit and distribute Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA (each, a "Publisher-Principal"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Licensing

- 1.1 Subject to the terms and conditions of this Agreement, upon receipt of appropriate license requests from Licensee (each, a "License Request"), HFA shall, to the extent authorized by Participating Publisher-Principals (as defined in Section 1.2 below), issue on behalf of each such Publisher-Principal a limited, nontransferable, nonexclusive license ("License") to reproduce, digitally transmit and distribute Musical Works owned and/or controlled by such Publisher-Principals (each, a "Licensed Work") solely for use on the Service in strict accordance with the terms and conditions of this Agreement. With respect to each Licensed Work, the license authority contemplated hereunder and granted pursuant to any License issued hereunder is for use solely in connection with the Service, and shall include and be limited to:
- (a) the digital reproduction by Licensee of the Licensed Work on a central computer server or servers ("Servers"), owned and operated by Licensee and

located in the United States (including its territories and possessions) (collectively, the "United States") (each, a "Server Fixation"); (b) the digital transmission of the Licensed Work from such Servers for digital storage on DJUs that are manufactured by or on behalf of Licensee in strict accordance with the requirements and specifications set forth in Section 5, and placed by Licensee as part of its Service at public and/or commercial establishments located in the United States; and (c) the digital reproduction of the Licensed Work on such DJUs for the purpose of permitting playback of such Licensed Work, without any further reproduction or distribution from any individual DJU to another DJU or any other device (each, a "DJU Delivery"). For the avoidance of doubt, the license authority under any License issued hereunder is limited to and granted solely with respect to (x) a particular individual sound recording embodying the applicable Licensed Work, and (y) the portion(s) of the Musical Work owned and/or controlled by the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of approximately four (4) weeks (the "Opt-In Period") offer to each of its Publisher-Principals the opportunity to request to make its Musical Works available for licensing under this Agreement by notifying HFA of its desire to opt in to this Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal", if such Participating Publisher-Principal at any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work, or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until this Agreement expires or is terminated in accordance with Section 8.
- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be reasonably modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be promptly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format: (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; (d) the name of the record company that produced the sound recording embodying the Musical Work; (e) the name of the artist performing such sound recording; (f) the ISRC number for such sound recording; (g) the total playing time of such sound recording in its complete form, expressed in minutes and seconds;

(h) the title of an album for which such sound recording has been previously licensed; and (i) such other information as may be required by HFA's Request Format.

- 1.4 HFA shall from time to time, to be determined in its reasonable discretion, provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report, a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, each such Confirmation Report shall reflect, *inter alia*, the percentage ownership share(s) of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize Musical Works with visual images resulting in audiovisual works (other than (i) nonanimated album artwork provided by the applicable sound recording owners, (ii) metadata (i.e., publisher, writer, label and artist information) pertaining to the Licensed Works and sound recordings, and/or (iii) the still likeness of the relevant performing artist); (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any rights to alter the fundamental character of a Musical Work, including but not limited to alteration of such fundamental character by excerpting or fragmenting the work; (g) any merchandising rights; (h) any use of a Musical Work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (i) any use of the title of a Musical Work, or the name or likeness of any writer, publisher or artist associated with a Musical Work, except for identification purposes as described in Section 4. For the avoidance of doubt, it is understood and agreed that Licensee may encrypt and/or digitally compress sound recordings of the Licensed Works solely for the purpose of fulfilling the security obligations set forth in Section 5 below and otherwise operating the Service in conformance with this Agreement. For the purpose of advising Publisher-Principals who may wish to know, Licensee represents that it is in the process of obtaining public performance licenses for the Service from ASCAP, BMI and SESAC, and will not operate the Service with respect to Musical Works for which Licensee has not obtained public performance licenses.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.
- 1.7 Licensee represents that in some cases a DJU may be combined with an analog jukebox unit that plays selections using analog technology directly from physical compact discs ("CDs") housed in such unit, without

reproducing the musical compositions so played (each such play, an "Analog Play"). For the avoidance of doubt, and notwithstanding any other provision of this Agreement, it is understood and agreed that this Agreement does not extend to or cover any rights or obligations associated with Analog Plays and no royalty is payable hereunder for any Analog Plays.

## 2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual sound recording embodying a Licensed Work made on a Server (but not any subsequent fixation of the identical sound recording of the Licensed Work on the same or any other Server made pursuant to a License issued under this Agreement) ("Initial Server Fixation"), and (b) the total number of times such individual sound recording embodying a Licensed Work is played on all DJUs throughout the Service during the applicable reporting period (each such play, a "DJU Play"), except for Promotional Plays (as defined in Section 2.5 below). Licensee shall provide a quarterly statement in electronic form in accordance with the format specified in Exhibit B (each, a "Statement") (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement: (t) the applicable HFA License number, (u) whether an Initial Server Fixation was made, (v) the royalty amount being paid for any Initial Server Fixation, (w) the total number of DJU Plays throughout the Service, less any Promotional Plays (each, a "Payable Play"), (x) the total royalty amount being paid for such Payable Plays, (y) the total number of Promotional Plays (as defined in Section 2.5 below), and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%), calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall  
**REDACTED**  
; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 For each DJU Play, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

- 2.4 Within five (5) business days following the execution of this Agreement, Licensee shall pay to HFA a nonrefundable advance in the amount of **REDACTED**. Such advance shall be recoupable from all royalties owed to HFA by Licensee under this Agreement.
- 2.5 Notwithstanding the provisions of Subsections 2.2 and 2.3 hereof, no royalty shall be payable for Promotional Plays (as hereafter defined). A "Promotional Play" is a DJU Play that is made free of charge and without consideration solely for the purpose of a DJU product demonstration that is made to an existing or potential customer or business associate of Licensee in a so-called "business to business" setting not open to the general public, including without limitation at a trade show or in the office, distribution center, warehouse or showroom of Licensee or a customer or an affiliate of Licensee.
- 2.6 In the event that Licensee agrees at any time during the Term to pay any music publisher that is not a Participating Publisher-Principal a royalty rate greater than the rate set forth in Subsections 2.2 and/or 2.3 above for any of the rights granted hereunder, Licensee shall give HFA prompt written notice thereof and, commencing on the effective date of such higher third-party rate, the royalty set forth in Subsections 2.2 and/or 2.3, as applicable, shall be automatically adjusted to such higher rate.
- 2.7 For the avoidance of doubt, it is understood and agreed that no fee or royalty other than as expressly set forth herein shall be required of Licensee or its customers for the rights granted to Licensee hereunder.
3. **Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2006 (the "Term"). If Licensee wishes to extend this Agreement for an additional period, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such extension. Any extension shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

4. **Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with a DJU Play of any Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

## 5. Security

- 5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized access to or reproduction, distribution or other use of the Licensed Work; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, proprietary units for digital storage of music such as the DJUs employed by Licensee; and (d) that ensure that the exclusive method for a public or commercial establishment to implement and operate the Service is through a DJU located on the premises of such public or commercial establishment. Without limitation, Licensee's Security Systems shall include at a minimum those measures set forth in Exhibit C hereto.
- 5.2 In the event it becomes aware of a material breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best reasonable efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within two (2) business days from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA), and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep HFA reasonably apprised of the status of its efforts to resolve the Security Breach, and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.
- 5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best reasonable efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements, and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.
- 5.4 Licensee shall use its best reasonable efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and

users of the Service and/or in any facility, on any device (including but not limited to DJUs) or by any person under the supervision and/or control of Licensee.

**6. Royalty and Security Compliance**

- 6.1 Notwithstanding, without limiting and in addition to the general right pursuant to industry custom and practice of HFA and/or any Participating Publisher-Principal to examine the books and records of Licensee in connection with Licensee's use of the Licensed Works, HFA shall be entitled, upon thirty (30) days' prior written notice to Licensee, to conduct, at the expense of HFA, an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, payment and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than three (3) years following the termination of this Agreement.
- 6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensees' Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information, along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to, as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

At the request of Licensee, prior to commencing the Royalty and Security Examination, any outside examiner acting on behalf of HFA shall execute a nondisclosure agreement substantially in the form of Exhibit D hereto.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least three (3) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the reasonable satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

#### **7. Representations and Warranties; Disclaimer; Indemnity**

- 7.1 Licensee represents and warrants that: (a) it has the full right, power and authority to enter into and perform this Agreement in accordance with its terms and conditions; (b) it shall take all steps necessary to implement and shall comply with (i) its security obligations set forth in Section 5, and (ii) the requirements set forth in Section 9; and (c) the Service shall (i) neither infringe upon nor violate the intellectual property rights or other rights of any third party, and (ii) comply with all applicable laws, rules and regulations.
- 7.2 HFA represents and warrants that it has the full right, power and authority to enter into this Agreement and perform its obligations hereunder.
- 7.3 Licensee agrees to indemnify, defend and hold harmless HFA from and against any losses, injuries, damages, claims, expenses and costs (including without limitation reasonable attorneys' fees) incurred or suffered by HFA, arising from any third-party actions, claims, suits or legal proceedings of any kind, caused by, incident to or arising out of Licensee's breach of its representations, warranties or covenants hereunder.



## 8. Termination/Default

- 8.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission, reproduction and/or playback of any Licensed Work after the expiration or termination of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Local Unit Deliveries existing on DJUs as of the expiration of the Agreement may remain on such Servers and DJUs; provided, however, that such existing Server Fixations (in addition to the DJU Deliveries) may not be further reproduced, distributed or played back after the expiration of the Agreement.
- 8.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that in the event that (a) Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission, reproduction and/or playback of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 the Copyright Act; (b) Licensee is in material breach or default of any of its obligations under this Agreement (it being understood and agreed that an alleged breach of Section 7.1(c) hereof shall not be deemed a breach of this Agreement unless and until Licensee is subject to an adverse judgment by a court of competent jurisdiction with respect thereto), HFA may provide written notice to Licensee that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission, reproduction and/or playback of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations or restrictions imposed by Subsections 1.1, 1.5, 1.6 and Sections 2, 5, 6, 7, 9 and 10.5 of this

Agreement shall be considered a material breach of, and default under, this Agreement.

- 8.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; (e) Licensee's insolvency; or (f) Licensee's inability to pay its debts as they become due. Upon the occurrence of any of the events described in items (a) through (f) of this Subsection 8.3, notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.
- 8.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 8.2, the breach of any of the provisions set forth in Sections 5, 6 and 9 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.
- 8.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5, 6, 7, 8, 9 and 10 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.
9. **Proprietary and Confidential Information**
- 9.1 HFA shall have no obligation to perform its obligations hereunder unless and until Licensee enters into the Data Access and Use Agreement, attached hereto and incorporated herein as Exhibit E (the "Data Access and Use Agreement"), governing the nondisclosure and use of HFA Confidential Information (as defined in the Data Access and Use Agreement) by Licensee.
- 9.2 To the extent Licensee seeks to have a third-party individual or entity obtain access to HFA Confidential Information for purposes of obtaining and administering Licenses and otherwise fulfilling its obligations under this Agreement (each, a "Third-Party Administrator"), Licensee must obtain HFA's prior consent of each such Third-Party Administrator (such consent not to be unreasonably withheld). Upon HFA's consent to Licensee's use of such Third-Party Administrator, HFA will require that such Third-Party

Administrator enter into a data access and use agreement with HFA substantially in the form of the Data Access and Use Agreement, prior to allowing such Third-Party Administrator access to any HFA Confidential Information.

- 9.3 The parties hereby acknowledge and agree that as of the date hereof, Selverne, Mandelbaum & Mintz, LLP ("SMM") is providing certain services to Licensee in connection with its representation of Licensee pertaining to the administration of the Licenses required for the Service. The parties further acknowledge that in the course of administration certain independent contractors engaged by SMM ("SMM Independent Contractors") may have access to HFA Confidential Information. Licensee hereby represents and warrants: (a) each of the SMM Independent Contractors with access to HFA Confidential Information shall execute a data access and use agreement with HFA substantially in the form of the Data Access and Use Agreement prior to accessing any such HFA Confidential Information; (b) the IT infrastructure through which the SMM Independent Contractors access the HFA Confidential Information is solely owned and controlled by Licensee and does not constitute any part of SMM's IT infrastructure and will not be accessible through SMM's IT infrastructure; and (c) to the extent that Licensee, from time to time, may seek legal advice from SMM pertaining to the Purpose (as defined in the Data Access and Use Agreement), Licensee will only disclose HFA Confidential Information to SMM in the form of individual data records (rather than aggregated data) and only to the extent necessary to accomplish the Purpose, and will, prior to such disclosure, instruct SMM in writing to keep any such HFA Confidential Information confidential on terms at least as restrictive as those terms applicable to Licensee under the Data Access and Use Agreement.

10. Miscellaneous

- 10.1. Administrative Fee. In addition to the royalties payable hereunder, within five (5) business days following execution of this Agreement, Licensee shall pay to HFA a non-refundable administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-out and licensing processes contemplated hereunder.
- 10.2 Guarantee. In consideration of HFA entering into this Agreement, Guarantor hereby irrevocably agrees to guarantee performance by Licensee of all present and future duties and obligations of Licensee pursuant to Subsections 2.2, 2.3, 7.3 and 10.1 hereof. Guarantor agrees that HFA may proceed directly against Guarantor hereunder without first having to proceed against Licensee with respect to any such duties and/or obligations. This guarantee in no way diminishes any other legal or equitable rights that HFA may have with respect to the enforcement of the provisions of this Agreement. Notwithstanding the foregoing, the parties hereto agree that nothing in this Agreement, express or

implied, is intended to confer, nor shall anything herein confer on, Guarantor or any person other than Licensee and its successors or permitted assigns, any rights or remedies hereunder.

- 10.3 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

**Redacted**

- 10.4 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.
- 10.5 Assignment. This Agreement is binding on the parties and their respective executors, administrators, legal representatives and successors. Neither party may assign this Agreement without the written consent of the other party.
- 10.6 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 10.7 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.

- 10.8 Severability; Waiver. If a court of competent jurisdiction should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 10.9 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 10.10 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.
- 10.11 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, HFA, Licensee and, with respect to Subsection 10.2 only, Guarantor have executed this Agreement as of the Effective Date:

**Redacted**

THE HARRY FOX AGENCY, INC.

\_\_\_\_\_  
By:  
Title:

**Redacted**

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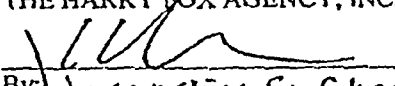
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- 10.8 Severability; Waiver. If a court of competent jurisdiction should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 10.9 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 10.10 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.
- 10.11 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, HFA, Licensee and, with respect to Subsection 10.2 only, Guarantor have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By:   
Title: SVP & General Counsel

Redacted

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- 10.8 Severability; Waiver. If a court of competent jurisdiction should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
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- 10.10 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.
- 10.11 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, HPA, Licensee and, with respect to Subsection 10.2 only, Guarantor have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By:  
Title:

Redacted

**Exhibit A**  
**HFA Request Format**

See attached.





# Digital Jukebox Music License Request & Output File Layout

Acceptable file formats are:

- 1 ASCII text either in a delimited or fixed width format (.txt)
- 2 Lotus 123 workbook(.wk)
- 3 MS Excel spreadsheet(.xls)

Description	Type	Length	Decimal	Input Option	
1 Manufacturer Number	A	6		M	
2 Transaction Date	N	8	0	M	
3 Manufacturer Request Number	N	8	0	M	
4 Label Name	A	15		M	
5 ISRC Code	A	15		O	
6 Playing Time - Minutes (for matching purposes only)	N	3	0	M	
7 Playing Time - Seconds (for matching purposes only)	N	2	0	M	
8 Artist	A	200		M	
9 Song Title	A	200		M	
10 A/K/A Song Title	A	200		O	
11 ISWC Code	A	11		O	
12 HFA Song Code	A	6		O	
13 Song Writer(s)	A	200		M	
14 Publisher Name	A	60		O	* Repeating Group
15 HFA Publisher Number	A	6		Output	
16 Exact Per Publisher Share	N	7	4	Input (optional)/Output	**
17 Catalog Number	A	15		O	
18 Album Title	A	200		M	
19 UPC Code	A	16		M	
20 Configuration Code(s)	A	2		M	
21 License Type	A	1		M	
22 Server Fixation Date	N	8	0	M	
23 Rate Code	A	1		M	
24 Rate in Cents	N	7	7	M	
25 HFA License Number	N	10		Output	
26 HFA License Status Code #1	A	2		Input/Output	**
27 HFA Flag for Amended Publisher Data	A	1		Output	
28 Publisher Status	A	1		Output	
29 Total HFA Represented Share	N	7	4	Output	
30 HFA License Status Code #2	A	2		Output	
31 HFA License Status Code #3	A	2		Output	
32 User Defined	A	30		Input/Output	

**KEY:**  
**TYPE:**  
 A = Alphanumeric Field  
 N = Numeric Field

**LENGTH:** For Alphanumeric fields, represents the maximum number of characters required.  
 For Numeric fields, represents the maximum number of characters required.  
**DECIMAL:** Number of characters after decimal (for numeric fields only)

**INPUT OPTION:**  
 M = Mandatory  
 O = Optional

\*\* All input/output fields should be left blank upon initial license submission, EXCEPT for:  
 a) Field 16 if exact publisher share is known  
 b) Field 26 which should be populated with the letter R IF the record is a resubmission that has been amended



## Digital Jukebox Music Electronic License File Field Definitions

	Field	Type: Mandatory (M) Optional (O) Conditional (C)	Explanation	Example
1	Manufacturer Number	M	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	M	Date electronic license request submitted to HFA	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
3	Manufacturer Request Number	M	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested	12345678
4	Label Name	M	The name of the record label that produced the applicable recording	Epic
5	ISRC Code	O	International Standard Recording Code. ISRC code assigned to the recording by the record label.	USSM19804780
6	Playing Time - Minutes	M	The number of minutes in the duration of the applicable recording (for matching purposes only)	Duration = 5 minutes and 52 seconds Data entered: 005
7	Playing Time - Seconds	M	The number of seconds over the last full minute in the duration of the applicable recording (for matching purposes only)	Duration = 5 minutes and 52 seconds Data entered: 52
8	Artist	M	The name of the artist performing the applicable recording	Beatles
9	Song Title	M	Title of work for which a License is requested	Yesterday
10	AKA Song Title	O	Other names by which the work is known	Over the Rainbow; Somewhere Over the Rainbow
11	ISWC Code	O	International Standard Musical Work Code. Code assigned to works by the network of ISO/ISWC Local or Regional agencies	Example: T-034.524.680-1 Data Entered: T0345246801
12	HFA Song Code	O	Identifier assigned by HFA to identify a work uniquely	Example: Y12345
13	Songwriter(s)	M	Name of the composer(s) of the work.	Format: [First Name] [Last Name], [First Name], etc Example: Michael Ross, Tom Smith
14	Publisher Name	O	Name of publisher owning a share of the work. <i>Additional publishers should be listed on separate lines using the same manufacturer's request number assigned to the work.</i>	EMI Mills
15	HFA Publisher Number	O	Identifier assigned by HFA to identify a publisher uniquely.	P12345
16	Exact per Publisher Share	O	Percent of song owned by a specific publisher.	Example: 66.667% Data Entered: 066.6670
17	Catalog Number	O	The catalog number of a prior physical product that has been previously licensed.	12345-2
18	Album Title	M	The title of a prior physical product that has been previously licensed.	Parachute
19	UPC Code	M	The UPC code of a prior physical product that has been previously licensed.	706301594728

20	Configuration Code	M	Code designating configuration type(s) applicable. FX = Initial Server Fixation Copy JP = Digital Jukebox Unit Play PA = Payable Play PM = Promotional Play	JP
	License Type	M	Classification of license type requested. G = Digital	G
22	Server Fixation Date	M	The date the applicable recording was or is expected to be fixed to the server for distribution.	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
23	Rate Code	M	Code designating type of rate applicable.	N = Negotiated
24	Rate In Cents	M	Rate indicated as a penny rate. Please note: JP and PM always = 0	0.005
25	HFA License Number	Output	Number assigned by HFA for each license	1010120001
26	HFA License Status Code #1	Input/Output	Input: Use only to designate amended record - use code R in field Output: Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	Input: R - indicates this record has been amended and is being resubmitted Output: 40 = MISSING MANDATORY FIELD - MANUFACTURER REQUEST NUMBER
27	HFA Flag for Amended Publisher Data	Output	Indicates that publisher information submitted by licensee differs on HFA database (for HFA represented publishers only)	Y = Flagged so that requestor can note that HFA publisher information differs from that submitted
28	Publisher Status	Output	Publisher Status	blank = Participating HFA publisher N = Non-HFA Publisher D = HFA Publisher, licensing direct to Licensee (i.e.: affiliated with Licensee) B = Non Participating HFA Publisher or Song Blocked by Publisher
29	Total HFA Represented Share	Output	Total % of work represented by HFA	Example: 66.667% Data Entered: 066.6670
30	HFA License Status Code #2	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	40 = MISSING MANDATORY FIELD - MANUFACTURER REQUEST NUMBER
31	HFA License Status Code #3	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	40 = MISSING MANDATORY FIELD - MANUFACTURER REQUEST NUMBER
32	User Defined	Input/Output	This field is reserved for and defined by each record company. HFA will send back this information in the output file.	



## License Matching/ Edit Validation Status Codes

### **MATCHING MISCELLANEOUS**

RM REMOVE REQUEST FROM LICENSE REQUEST FILE

RM REMOVE REQUEST FROM LICENSE REQUEST FILE

01 NO MATCH FOUND (FOR OTHER THAN SPECIFICALLY LISTED REJECT CODES)

01 NO MATCH FOUND (FOR OTHER THAN SPECIFICALLY LISTED REJECT CODES)

02 DUPLICATE LICENSE REQUEST (1<sup>st</sup> PASS - PRELIMINARY SCAN; WITHIN THE CURRENT BATCH)

03 DUPLICATE LICENSE REQUEST (2<sup>nd</sup> PASS, ALREADY LICENSED, PART OF EDIT VALIDATION PROCESS)

### **RECORD MATCH**

10 SONG TITLE NOT FOUND

11 SONG TITLE MATCH ONLY, INSUFFICIENT FOR LICENSE

12 SONG TITLE AND ARTIST MATCH ONLY, INSUFFICIENT FOR LICENSE

13 SONG TITLE AND ALBUM MATCH ONLY, INSUFFICIENT FOR LICENSE

14 SONG TITLE AND CATALOGUE / UPC # MATCH ONLY, INSUFFICIENT FOR LICENSE

### **RECORD EDIT VALIDATION**

20 SONG TITLE AND SONG CODE GIVEN DO NOT MATCHED

21 DUPLICATE LICENSE REQUEST NUMBER

22 INVALID ISRC CODE

23 INVALID UPC CODE

24 INVALID CONFIGURATION CODE

25 INVALID LICENSE TYPE

26 LICENSE TYPE AND CONFIGURATION CONFLICT

27 INVALID FIXATION DATE

28 INVALID RATE

29 NO RECORDED CONTROLLED COMPOSITION RATE RECORDED FOR PUBLISHER

30 INVALID PLAYTIME

### **MISSING MATCHING DATA ELEMENTS (INCLUDING MANDATORY AND CONDITIONAL FIELDS)**

40 MISSING MANDATORY FIELD - MANUFACTURER REQUEST NUMBER

41 MISSING MANDATORY FIELD - LABEL NAME

42 MISSING MANDATORY FIELD - ISRC CODE

43 MISSING MANDATORY FIELD - PLAYTIME

- 44 MISSING MANDATORY FIELD - ARTIST
- 45 MISSING MANDATORY FIELD - SONG TITLE
- 46 MISSING MANDATORY FIELD - CONFIGURATION CODE
- 47 MISSING MANDATORY FIELD - LICENSE TYPE
- 48 MISSING MANDATORY FIELD - SERVER FIXATION DATE
- 49 MISSING MANDATORY FIELD - RATE
- 50 MISSING CONDITIONAL FIELDS
- 51 MISSING IDENTIFIER - SUCH AS ISRC / CATALOGUE NUMBER / UPC
- 52 MISSING MANDATORY FIELD - WRITER

#### PENDING SONG

- 70 SONG INFORMATION SENT TO PUBLISHER FOR VERIFICATION
- 71 PUBLISHER DESIGNATED ON REQUEST DOES NOT CLAIM THIS SONG
- 72 PUBLISHER LICENSED DIRECTLY
- 75 HFA CANNOT PROCESS LICENSE REQUEST WITH INFORMATION AS PROVIDED
- 76 MULTIPLE SONGS REQUESTED (MEDLEY); LICENSEE MUST RESUBMIT EACH SONG SEPARATELY
- 77 SONG INFORMATION SENT TO PUBLISHER FOR LICENSING APPROVAL
- 78 PUBLISHER DID NOT APPROVE SONG FOR LICENSING
- 79 HFA PUBLISHER, PENDING UPDATED CONTACT INFORMATION

#### PUBLISHER EDIT VALIDATION

- 81 PUBLISHER NOT REPRESENTED BY HARRY FOX AGENCY
- 82 PUBLISHER UNKNOWN
- 83 PUBLISHER DID NOT OPT-IN TO AGREEMENT
- 84 LICENSE REQUEST ON HOLD PENDING PUBLISHERS APPROVAL
- 85 SONG OWNED BY LICENSEE'S PUBLISHING BRANCH; TO BE LICENSED DIRECT
- 86 SONG SPECIFIC BLOCK PER PUBLISHER'S INSTRUCTIONS
- 8A PUBLISHER NOT REPRESENTED BY HFA - TERM 3.5 RESEARCH IN PROGRESS
- 91 ORIGINAL VERSION OF SONG IS IN THE PUBLIC DOMAIN IN THE USA
- 92 PUBLISHER OWNERSHIP NOT YET VERIFIED
- 93 SONG PLACED ON HOLD FOR LICENSING BY PUBLISHER
- 94 SONG HAS RESTRICTIONS; REQUIRES PUBLISHER APPROVAL
- 95 OLD DERIVATIVE VERSION OF SONG, CURRENT PUBLISHER UNKNOWN
- 98 UNABLE TO LICENSE FOR MECHANICAL USAGE

The Harry Fox Agency, Inc.

**Exhibit B**  
**HFA Reporting Format**

See attached.



## Digital Jukebox Music Electronic Royalty Report File Layout

### Acceptable Data Formats:

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

### FILE HEADER (Control Portion for File Transfer)

Line Count	15	0	Number	Yes	Number of lines of data in file; used as control to verify complete and accurate file copy was received.	321456
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### FILE BODY

	Field Name	Field Length**	Decimal Places	Field Format	Field Option	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Mandatory	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	8	0	Number	Mandatory	Date electronic royalty report submitted to HFA. Format: YYYYMMDD	20010304 (3/4/2001)
3	Royalty Reporting Period	6		Text	Mandatory	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	030601 (i.e., quarterly reporting period, ending the 6th month of 2001.)
4	HFA License Number	12		Text	Mandatory	HFA License Number	1010810541
5	ISRC	15		Text	Conditional*	International Standard Recording Code. Either the ISRC Code or the UPC Code must be submitted.	USEM39700174
6	UPC	18		Text	Conditional*	UPC Code. Either the ISRC Code or the UPC Code must be submitted.	706301594728
7	Configuration Code	2		Text	Mandatory	Code designating the specific format or medium licensed. FX = Initial Server Fixation JP = Digital Jukebox Unit Play PA = Payable Play PM = Promotional Play	FX, JP, PA, PM
8	HFA Song Title	30		Text	Mandatory	Title of work being licensed.	HAPPY DAY
9	Manufacturer Request Number	15		Text	Optional	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested.	54321
10	Sales Channel	5		Text	Mandatory	Please repeat configuration code reported in Field #7.	FX, JP, PA, PM
11	Units (For Period)	9	0	Number	Mandatory	Applicable number of Server Fixations, Digital Jukebox Plays, Payable Plays or Promotional Plays under license number reported in Field #4 above.	FX = 1, JP = 1000, PA = 990, PM = 10
12	Units (To Date)	9	0	Number	Optional	Applicable number of Server Fixations, Digital Jukebox Plays, Payable Plays or Promotional Plays under license number reported in Field #4 above.	FX = 1, JP = 3250, PA = 3125, PM = 125
13	Net Royalty Rate	5	8	Numeric	Mandatory	HFA Cumulative Publisher Share Representation Percentage X Applicable Agreed upon Rate for the Configuration(s) listed in Field #7 (i.e: FX = 80% x .085 = .068, PA = 80% x .005 = .004) Please note: JP and PM always = 0	FX = 0.068, JP = 0, PA = 0.004, PM = 0
14	Total Royalty Amount (For Period)	11	8	Numeric	Mandatory	Number of Server Fixations or Payable Plays (as applicable) in Field 11 X Net Royalty Rate determined in Field #13 (i.e: FX = .068 for the Initial Server Fixation, PA = 3.90 for 990 Payable Plays)	FX = 0.068, JP = 0, PA = 3.960, PM = 0
15	Total Royalty Amount (To Date)	11	8	Numeric	Optional	Number of Server Fixations or Payable Plays (as applicable) in Field 12 X Net Royalty Rate determined in Field #13 (FX = 0.068 for the Initial Server Fixation, PA = 12.50 for 3125 Payable Plays)	FX = 0.068, JP = 0, PA = 12.50, PM = 0
16	Distribution Service(s)	30		Text	Optional	Service through which the unit was manufactured or service through which jukebox plays were made	MATT'S BAR

Note: Please use UPPERCASE for all data entries.

\*\* Any characters or digits exceeding these per field maximums will be truncated.  
Conditional\* = Either the ISRC Code or UPC Code must be submitted.

## Exhibit C

### Security Features of the Service

In order to deter unauthorized access of licensed music content, Licensee shall include several built-in layers of security for the Service. Specifically:

- o All client-server communications and downloads utilize 128-bit SSL-encryption and a proprietary HTTP-based messaging protocol.
- o All jukebox client requests include their network card's unmodifiable MAC address which is manually registered with the central network when built at Licensee factory. Client requests which lack a valid and recognizable MAC address are reported and all requests from that location are denied.
- o All MP3 music files are encrypted using symmetric 56-bit DES encryption which uses song-specific 64-bit keys. These song-specific keys are themselves encrypted and stored separately from their respective MP3 music files.
- o Each song-specific key is itself encrypted using one of 10 different custom scrambling algorithms. The descrambled key is never transmitted or saved to disk it exists only in the RAM of the jukebox client during song playback.
- o On the all-digital model the decrypted MP3 file exists only during song playback, after which time it is immediately wiped from the hard drive. On the hybrid model the decrypted MP3 file is written to limited capacity DRAM which is immediately overwritten by subsequent requests.
- o The all-digital jukebox can be remotely deactivated via the server by an AMi system administrator. This will be done if subscription payments are not made or if a jukebox is reported missing.
- o To guard against unauthorized use the all-digital model is programmed to stop playing songs if it fails to contact and authenticate itself to the central music servers after some designated period of time.

Live client-server requests, such as song downloads, can only be made from jukebox clients that have a centrally registered network MAC address and have a valid account status. Continued operation of the all-digital jukebox requires both a valid account status (i.e. up-to-date royalty payments) as well as successful periodic connections to the central servers.



**Exhibit D**

**Examiner NDA**

[DATE]

[ADDRESSEE]

[LICENSEE]

[ADDRESS]

[ADDRESS]

Re: Royalty Examination of LICENSEE (EXAM PERIOD)

To Whom It May Concern:

We have been requested by The Harry Fox Agency, Inc. ("HFA") to examine, commencing on DATE, the books and records of LICENSEE for the period EXAM PERIOD in connection with LICENSEE'S royalty reports and payments to HFA-affiliated publishers.

We agree that, except as authorized in writing by LICENSEE, we will not disclose to anyone other than HFA, its officers and employees, legal counsel, and Participating Publisher-Principals, any information that we obtain from our examination of LICENSEE's books and records; provided, however, that we may disclose such information in the context of a legal action or proceeding, and further provided that it is understood that HFA and its affiliated publishers may disclose such information as they deem appropriate.

Sincerely,

[AUTHORIZED EXAMINER]  
on behalf of [EXAMINER'S FIRM]

**Exhibit E**

See attached Data Access and Use Agreement.

Execution Copy

Data Access and Use Agreement

This Data Access and Use Agreement ("Agreement") is entered into as of May 20, 2004, by and between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and

("Recipient"). Redacted

WHEREAS, Recipient (also referred to at times herein as "Licensee"), HFA, and, solely with respect to certain limited obligations, Redacted, a Delaware corporation, have entered, or expect to enter, into that certain Digital Jukebox Service Licensing Agreement, dated as of May 20, 2004 (the "License Agreement"), pursuant to which HFA has granted, or will grant, limited rights to certain copyrighted musical compositions (each, a "Musical Work") in connection with the operation of Licensee's digital jukebox service; and

WHEREAS, Recipient seeks to access and use certain HFA Confidential Information (defined in Section 1 below) as necessary to obtain and administer the licenses issued under the License Agreement (each, a "License"), and as otherwise may be necessary to comply with Licensee's obligations under the License Agreement (collectively, the "Purpose"), and HFA has agreed to allow Recipient such limited access to and use of the HFA Confidential Information solely as necessary to accomplish the Purpose;

NOW THEREFORE, in consideration of the premises of and the mutual promises, covenants and agreements contained in this Agreement, HFA and Recipient agree as follows:

1. HFA Confidential Information.

"HFA Confidential Information" means any and all information and material disclosed by HFA to Recipient in connection with this Agreement and/or the License Agreement or obtained by Recipient from HFA in connection with this Agreement and/or the License Agreement (whether in writing, or in oral, graphic electronic or any other form) that is proprietary and/or is intended by HFA to remain confidential relating to HFA's business and its databases, products, services, business strategies, capabilities or business affairs, including without limitation, all data and information related to the Musical Works and ownership thereof and/or HFA's publisher-principals.

2. Non-Disclosure and Limited Use.

Recipient covenants (a) to hold all HFA Confidential Information in strict confidence, (b) that it shall disclose (or permit access to) the HFA Confidential Information solely to (or by) its employees, if any, who need to know or access such HFA Confidential Information to accomplish the Purpose, and who are bound by nondisclosure and use restrictions and obligations comparable to and at least as restrictive to those set forth herein, and (c) that it shall not disclose to any third party, including any agent, contractor, consultant or other party, or permit any such party to access, the HFA Confidential Information, unless and until such party has entered into a written agreement with HFA in form and substance of this Agreement governing the nondisclosure and use of the HFA Confidential Information. Recipient further covenants that it shall (y) use HFA Confidential Information solely as necessary to accomplish the Purpose, and (z) not extract, aggregate, derive or copy any HFA Confidential Information, whether by bulk transfer or through individual data query and response, for use or incorporation in any database, unless the sole purpose of such use or incorporation is to accomplish the Purpose. Recipient agrees to notify HFA immediately upon obtaining any information regarding unauthorized disclosure or access to the HFA Confidential Information.

Notwithstanding the disclosure and use restrictions in this Section 2, Recipient may disclose HFA Confidential Information (i) that is independently derived or acquired from a party not subject to a duty of confidentiality to HFA, or (ii) to the extent required to respond to the request of a court of competent jurisdiction, provided that upon receiving any such request and to the extent that it may do so without violating any law, Recipient prior

to such disclosure advises HFA of such request in order that HFA may take such action as it deems appropriate to protect the HFA Confidential Information. During the Term (defined in Section 5 below) and for a period of three (3) years following the termination or expiration of this Agreement, Recipient agrees to permit HFA to inspect, on a semi-annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Confidential Information is (or was) used in Recipient's facilities, if any, and to furnish whatever assistance is reasonably necessary to permit HFA to determine whether Recipient, including its employees, agents, subcontractors, independent contractors, consultants or other parties, if any, are in compliance with this Agreement.

### **3. Ownership.**

Recipient acknowledges and agrees that all right, title and interest in and to the HFA Confidential Information (including all copies, extracts and portions thereof) is and shall remain the sole property of HFA. Recipient does not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights under this Agreement or any disclosure or access hereunder, except the limited right to use such HFA Confidential Information in strict accordance with the express provisions of this Agreement. All rights relating to the HFA Confidential Information that are not expressly granted hereunder to Recipient are reserved and retained by HFA.

### **4. No Warranty; Limitation of Liability.**

EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE HFA CONFIDENTIAL INFORMATION OR ANY USE THEREOF, AND THE HFA CONFIDENTIAL INFORMATION IS PROVIDED ON AN "AS IS" BASIS. EXCEPT AS OTHERWISE MAY BE EXPRESSLY SET FORTH IN THE LICENSE AGREEMENT WITH RESPECT TO LICENSEE, HFA HEREBY EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES, INCLUDING, BUT NOT LIMITED TO, CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA CONFIDENTIAL INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA CONFIDENTIAL INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT, EVEN IF HFA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

### **5. Term; Termination.**

This Agreement will continue for the term of the License Agreement (including any agreed extensions thereof) (the "Term"), unless otherwise terminated by HFA in accordance herewith. HFA may terminate this Agreement at any time upon written notice, and shall have no further obligations to disclose to or permit access by Recipient to any HFA Confidential Information; and provided, however, that each party's rights and obligations shall otherwise survive the termination or expiration of this Agreement.

### **6. Purging of HFA Confidential Information.**

Promptly following any expiration or termination of this Agreement, Recipient shall purge and destroy any and all records and copies of HFA Confidential Information from any Recipient databases and other systems under Recipient's direct or indirect control, and any other media on which any HFA Confidential Information may have been provided, together with all copies thereof, whether in printed or machine readable form; provided, however, that Recipient may retain any records and copies of HFA Confidential Information solely to the extent and for the period necessary to permit Licensee to fulfill any further obligations under the License

Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

**7. Assistance of Counsel.**

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

**8. Specific Performance.**

Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and/or 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

**9. Miscellaneous.**

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

\_\_\_\_\_  
Recipient

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

7. Assistance of Counsel.

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

8. Specific Performance.

Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and/or 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

9. Miscellaneous.

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

\_\_\_\_\_  
Recipient

By: \_\_\_\_\_

Name: Jacqueline C. Charney  
Title: SVP & General Counsel

By: \_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ny-568225

Agreement, including without limitation, Licensee's accounting and royalty and security compliance obligations under Sections 2 and 6 of the License Agreement, after which period such records and copies shall be purged and destroyed as described in this Section 6. Notwithstanding the foregoing, Recipient is not required to purge and destroy any HFA Confidential Information to the extent such HFA Confidential Information was independently derived or acquired from a party not subject to a duty of confidentiality to HFA.

7. Assistance of Counsel.

Each party hereto acknowledges that it has been afforded the opportunity to be represented by its own independent counsel for purposes of reviewing this Agreement and discussing its terms prior to execution.

8. Specific Performance.

Recipient acknowledges that a breach of Recipient's obligations in Sections 2 and/or 6 of this Agreement may result in irreparable harm, the extent of which it would be difficult to ascertain, and therefore agrees that HFA shall be entitled to seek immediate injunctive relief to enforce any such obligation in addition to any other legal remedy to which HFA might be entitled.

9. Miscellaneous.

This Agreement (combined with the License Agreement, if the Recipient is the Licensee) constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether oral or written, between the parties relating to the subject matter hereof. No amendment, modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by duly authorized signatories of both parties. The waiver by either party of a breach of or a default under any provision of this Agreement shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws provisions. This Agreement and the rights and obligations hereunder may not be assigned or delegated by Recipient, in whole or part, whether voluntarily, by operation of law, change of control or otherwise, without the prior written consent of HFA. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provision valid and enforceable. The parties are independent contractors, and neither party shall have any authority of any kind to bind the other party in any respect whatsoever.

The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By: \_\_\_\_\_  
Name:  
Title:

Redacted

**EXHIBIT CO 0036**



3cc  
COPY

RINGTONE SERVICE  
LICENSING AGREEMENT

This agreement ("Agreement") is entered into as of April 21, 2004 ("Effective Date") by and between ("Licensee"), a California corporation with an office at Redacted REDACTED, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Licensing

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed thirty (30) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at

any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted**
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

**3. Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2006 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

**4. Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

**5. Security**

- 5.1** In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.
- 5.2** In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

- 5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.
- 5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.
6. **Royalty and Security Compliance**
  - 6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.
  - 6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensees' Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,

along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 7. Termination/Default
  - 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,



notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.

7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.

8. Miscellaneous

8.1. Administrative Fee. In addition to the royalties payable hereunder Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder in accordance with the following schedule: **Redacted** upon the execution of this Agreement and **Redacted** per month thereafter for a period of three months. Licensee shall make such monthly payments to HFA on the first business day of each month commencing in July 2004. *ju*

8.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

To the address set forth above. Attn:

**Redacted**

- 8.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.
- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.

8.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

**Redacted**

THE HARRY FOX AGENCY, INC.

By: 

Print name:

Jacqueline C. Chadsworth

Title: SVP

& General Counsel

# EXHIBIT A



## Ringtone Electronic License Request & Output File Layout

### Acceptable Data Formats:

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
3	Manufacturer Request Number	N	8	0	M
4	Ringtone Playing Time - Seconds	N	2	0	M
5	Song Title	A	200		M
6	A/K/A Song Title	A	200		O
7	ISWC Code	A	11		O
8	HFA Song Code	A	6		O
9	Song Writer(s)	A	200		M
10	Publisher Name	A	60		O*
11	HFA Publisher Number	A	6		Input/Output
12	Publisher Share	N	7	4	Input/Output
13	Catalog Number (for matching purposes only)	A	15		O
14	Configuration Code(s)	A	12		M
15	UPC Code (for matching purposes only)	A	16		O
16	License Type	A	1		M
17	Server Fixation Date	N	8	0	M
18	Rate Code	A	1		M
19	Rate In Cents	N	7	7	M
20	Artist Name (For Pre-Recorded Ringtone)	A	60		C*
21	Album Title (For Pre-Recorded Ringtone)	A	200		C*
22	Record Label (For Pre-Recorded Ringtone)	A	60		C*
23	Total Playing Time - Minutes (For Pre-Recorded Ringtone)	N	3	0	C*
24	Total Playing Time - Seconds (For Pre-Recorded Ringtone)	N	2	0	C*
25	ISRC Code (For Pre-Recorded Ringtones)	A	15		C*
26	User Defined	A	30		Input/Output
27	HFA License Number	N	10		Output
28	HFA License Status Code	A	2		Input/Output
29	HFA License Status Code 1	A	2		Output
30	HFA License Status Code 2	N	2		Output
31	HFA Flag for Amended Publisher Data	A	1		Output
32	Publisher Status	A	1		Output

### KEY:

#### TYPE:

A = Alphanumeric Field  
N = Numeric Field

LENGTH: For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required.

DECIMAL: Number of characters after decimal (for numeric fields only)

#### INPUT OPTION:

M = Mandatory

O = Optional

O\* = Optional, however, providing this information will greatly help expedite the licensing process if the song was released within the last six months.

C\* = Conditional - Information mandatory if request is for a Pre-Recorded Ringtone.

\*\*\* All input/output fields should be left blank upon initial license submission, EXCEPT for Field 28 which should be populated with the letter R in the input file if the record is a resubmission that has been amended.

## EXHIBIT B



### Ringtone Electronic Royalty Reporting File Layout

Acceptable file formats are:

- 1 MS Excel spreadsheet - please save it as type "csv" (comma separated values)
- 2 ASCII text either in a delimited (csv) or fixed width format (.txt)

#### FILE HEADER (Control Portion for File Transfer)

Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
Line Count	15	0	Number	Yes	Number of lines of data in file, used as control to verify complete and accurate file copy was received.	321456

#### FILE BODY

	Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Yes	Account number assigned by HFA to Licensee	M12345
2	Transaction Data	8	0	Number	Yes	Date electronic royalty report submitted to HFA Format: YYYYMMDD	20020304
3	Royalty Reporting Period	6		Text	Yes	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	30602
4	HFA License Number	12		Text	Yes	Number assigned by HFA for each license.	1012345678
5	Configuration Code	2		Text	Yes	Code designating the specific configuration licensed (FX, PH, RR). FX - Initial Server Fixation PH - Phonic Ringtone RR - Pre-Recorded Ringtone IMPORTANT NOTE: Each configuration must be reported as a separate line.	PH
6	Song Title	30		Text	Yes	Title of work for which a license was granted.	STARRY NIGHT
7	Units (For Period)	9	0	Number	Yes	Applicable number for each specific configuration shown in field #5	12345
8	Publisher Name	30		Text	Yes**	Name of the publisher owning a share of the work.	Famous
9	Publisher Ownership Share Percentage	7	4	Number	Yes**	Percent of song owned by specific publisher, as provided to licensee on license	33.3340
10	Royalty Rate	5	4	Numeric	Yes**	Royalty rate for each specific configuration shown in field #5	0.1000
11	Royalty Amount (For Period)	11	4	Numeric	Yes	Total royalties generated this period for this license.	1.2500
12	Service (ie: Third Party)	30		Text	Yes	Third party service through which the content was distributed (Each third party Service must be reported on a separate line)	RINGTONES2.COM

Note: Any characters or digits exceeding these per field maximums will be truncated.

Note: You must report by configuration(s) and units for each third party service through which content was distributed. See sample report for exam

\*\* A separate publisher share % line with corresponding publisher name must be given for each ringtone configuration if the title is not 100% payable through HFA.

**EXHIBIT CO 0037**

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COPY

**RINGTONES SERVICE  
LICENSING AGREEMENT**

This agreement ("Agreement") is entered into as of March 3, 2004 ("Effective Date") by and between **Redacted** ("Licensee"), a New York corporation with an office at **REDACTED**, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. Licensing**

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed thirty (30) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at



any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

2. **Reporting and Payment of Royalties**

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

**3. Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2006 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

**4. Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

**5. Security**

5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.

5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.

#### 6. Royalty and Security Compliance

6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.

6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensees' Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,

along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

## **7. Termination/Default**

- 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,

notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

- 7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.
- 7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.
8. Miscellaneous
- 8.1. Administrative Fee. In addition to the royalties payable hereunder, within five (5) business days following execution of this Agreement, Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder .
- 8.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

**Redacted**

- 8.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.
- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.

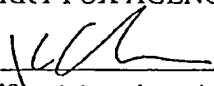


8.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.


IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By:   
Print name: JC Chamberworth  
Title: SVP & General Counsel

## EXHIBIT A



### Ringtone Electronic License Request & Output File Layout

**Acceptable Data Formats:**

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

Description	Type	Length	Decimal	Input Option
1 Manufacturer Number	A	6		M
2 Transaction Date	N	8	0	M
3 Manufacturer Request Number	N	8	0	M
4 Ringtone Playing Time - Seconds	N	2	0	M
5 Song Title	A	200		M
6 A/K/A Song Title	A	200		O
7 ISWC Code	A	11		O
8 HFA Song Code	A	6		O
9 Song Writer(s)	A	200		M
10 Publisher Name	A	60		O*
11 HFA Publisher Number	A	6		Input/Output
12 Publisher Share	N	7	4	Input/Output
13 Catalog Number (for matching purposes only)	A	15		O
14 Configuration Code(s)	A	12		M
15 UPC Code (for matching purposes only)	A	16		O
16 License Type	A	1		M
17 Server Fixation Date	N	8	0	M
18 Rate Code	A	1		M
19 Rate In Cents	N	7	7	M
20 Artist Name (For Pre-Recorded Ringtone)	A	60		C*
21 Album Title (For Pre-Recorded Ringtone)	A	200		C*
22 Record Label (For Pre-Recorded Ringtone)	A	60		C*
23 Total Playing Time - Minutes (For Pre-Recorded Ringtone)	N	3	0	C*
24 Total Playing Time - Seconds (For Pre-Recorded Ringtone)	N	2	0	C*
25 ISRC Code (For Pre-Recorded Ringtones)	A	15		C*
26 User Defined	A	30		Input/Output
27 HFA License Number	N	10		Output
28 HFA License Status Code	A	2		Input/Output
29 HFA License Status Code 1	A	2		Output
30 HFA License Status Code 2	N	2		Output
31 HFA Flag for Amended Publisher Data	A	1		Output
32 Publisher Status	A	1		Output

**KEY:**

**TYPE:**  
A = Alphanumeric Field  
N = Numeric Field

**LENGTH:** For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required.

**DECIMAL:** Number of characters after decimal (for numeric fields only)

**INPUT OPTION:**  
M = Mandatory  
O = Optional  
O\* = Optional, however, providing this information will greatly help expedite the licensing process if the song was released within the last six months.  
C\* = Conditional — Information mandatory if request is for a Pre-Recorded Ringtone.

**\*\*** All input/output fields should be left blank upon initial license submission, EXCEPT for Field 28 which should be populated with the letter R in the input file IF the record is a resubmission that has been amended.

## EXHIBIT B



### Ringtone Electronic Royalty Reporting File Layout

Acceptable file formats are:

- 1 MS Excel spreadsheet - please save it as type "csv" (comma separated values)
- 2 ASCII text either in a delimited (csv) or fixed width format (bq)

#### FILE HEADER (Control Portion for File Transfer)

Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
Line Count	15	0	Number	Yes	Number of lines of data in file; used as control to verify complete and accurate file copy was received.	321456

#### FILE BODY

	Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Yes	Account number assigned by HFA to licensee	M12345
2	Transaction Date	8	0	Number	Yes	Date electronic royalty report submitted to HFA Format: YYYYMMDD	20020304
3	Royalty Reporting Period	6		Text	Yes	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	30602
4	HFA License Number	12		Text	Yes	Number assigned by HFA for each license.	1012345678
5	Configuration Code	2		Text	Yes	Code designating the specific configuration licensed (FX, PH, RR). FX - Initial Server Fixation PH - Phonic Ringtone RR - Pre-Recorded Ringtone IMPORTANT NOTE: Each configuration must be reported as a separate line.	PH
6	Song Title	30		Text	Yes	Title of work for which a license was granted.	STARRY NIGHT
7	Units (For Period)	9	0	Number	Yes	Applicable number for each specific configuration shown in field #5	12345
8	Publisher Name	30		Text	Yes**	Name of the publisher owning a share of the work.	Famous
9	Publisher Ownership Share Percentage	7	4	Number	Yes**	Percent of song owned by specific publisher, as provided to licensee on license	33.3340
10	Royalty Rate	5	4	Numeric	Yes**	Royalty rate for each specific configuration shown in field #5	0.1000
11	Royalty Amount (For Period)	11	4	Numeric	Yes	Total royalties generated this period for this license.	1.2500
12	Service (ie: Third Party)	30		Text	Yes	Third party service through which the content was distributed (Each third party Service must be reported on a separate line)	RINGTONES.COM

Note: Any characters or digits exceeding these per field maximums will be truncated.

Note: You must report by configuration(s) and units for each third party service through which content was distributed. See sample report for exam

\*\* A separate publisher share % line with corresponding publisher name must be given for each ringtone configuration if the title is not 100% payable through HFA.

**EXHIBIT CO 0038**



## RINGTONES SERVICE LICENSING AGREEMENT

This agreement ("Agreement") is entered into as of January 22, 2004 ("Effective Date") by and between **Redacted** ("Licensee"), a Virginia corporation with an office at **Redacted**, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

### 1. Licensing

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed thirty (30) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at

any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

## 2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.



**3. Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2005 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

**4. Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

**5. Security**

5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.

5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.

## **6. Royalty and Security Compliance**

6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.

6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensees' Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,

along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

## **7. Termination/Default**

- 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,

notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.

7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.

#### 8. Miscellaneous

8.1. Administrative Fee. In addition to the royalties payable hereunder, Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder in accordance with the following schedule:

**Redacted**

8.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

To the address set forth above. Attn: **Redacted**

- 8.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.
- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.

8.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By: 

Print name:

*J C Chambers*

Title:

*SVP & General Counsel*

**EXHIBIT CO 0039**



RINGTONE SERVICE  
LICENSING AGREEMENT



This agreement ("Agreement") is entered into as of December 22, 2003 ("Effective Date") by and between **Redacted** ("Licensee"), a Washington corporation with an office at **REDACTED**, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. Licensing**

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed thirty (30) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at

any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

### 3. Term

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2005 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

### 4. Writer/Publisher Credit

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

### 5. Security

5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

- 5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.
- 5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.
6. **Royalty and Security Compliance**
  - 6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.
  - 6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensee's Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,

along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

## 7. Termination/Default

- 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,



notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

- 7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.
- 7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.

8. Miscellaneous

- 8.1. Administrative Fee. In addition to the royalties payable hereunder Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder, in accordance with the following schedule:

**Redacted**

- 8.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

To the address set forth above. Attn:

**Redacted**

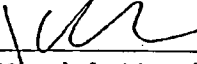
- 8.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.
- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.

8.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By:   
Print name: J C Chambers  
Title: SVP & general counsel

## EXHIBIT A



### Ringtone Electronic License Request & Output File Layout

**Acceptable Data Formats:**

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
3	Manufacturer Request Number	N	8	0	M
4	Ringtone Playing Time - Seconds	N	2	0	M
5	Song Title	A	200		M
6	A/K/A Song Title	A	200		O
7	ISWC Code	A	11		O
8	HFA Song Code	A	6		O
9	Song Writer(s)	A	200		M
10	Publisher Name	A	60		O*
11	HFA Publisher Number	A	6		Input/Output
12	Publisher Share	N	7	4	Input/Output
13	Catalog Number (for matching purposes only)	A	15		O
14	Configuration Code(s)	A	12		M
15	UPC Code (for matching purposes only)	A	16		O
16	License Type	A	1		M
17	Server Fixation Date	N	8	0	M
18	Rate Code	A	1		M
19	Rate In Cents	N	7	7	M
20	Artist Name (For Pre-Recorded Ringtone)	A	60		C*
21	Album Title (For Pre-Recorded Ringtone)	A	200		C*
22	Record Label (For Pre-Recorded Ringtone)	A	60		C*
23	Total Playing Time - Minutes (For Pre-Recorded Ringtone)	N	3	0	C*
24	Total Playing Time - Seconds (For Pre-Recorded Ringtone)	N	2	0	C*
25	ISRC Code (For Pre-Recorded Ringtones)	A	15		C*
26	User Defined	A	30		Input/Output
27	HFA License Number	N	10		Output
28	HFA License Status Code	A	2		Input/Output
29	HFA License Status Code 1	A	2		Output
30	HFA License Status Code 2	N	2		Output
31	HFA Flag for Amended Publisher Data	A	1		Output
32	Publisher Status	A	1		Output

**KEY:**

**TYPE:**

- A = Alphanumeric Field
- N = Numeric Field

**LENGTH:** For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required.

**DECIMAL:** Number of characters after decimal (for numeric fields only)

**INPUT OPTION:**

- M = Mandatory
- O = Optional
- O\* = Optional, however, providing this information will greatly help expedite the licensing process if the song was released within the last six months.
- C\* = Conditional — Information mandatory if request is for a Pre-Recorded Ringtone.

\*\*\* All Input/output fields should be left blank upon initial license submission, EXCEPT for Field 28 which should be populated with the letter R in the input file IF the record is a resubmission that has been amended.

## EXHIBIT B



### Ringtone Electronic Royalty Reporting File Layout

Acceptable file formats are:

- 1 MS Excel spreadsheet - please save it as type "csv" (comma separated values)
- 2 ASCII text either in a delimited (csv) or fixed width format (.txt)

#### FILE HEADER (Control Portion for File Transfer)

Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
Line Count	15	0	Number	Yes	Number of lines of data in file; used as control to verify complete and accurate file copy was received.	321456

#### FILE BODY

	Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Yes	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	8	0	Number	Yes	Date electronic royalty report submitted to HFA Format: YYYYMMDD	20020304
3	Royalty Reporting Period	6		Text	Yes	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	30602
4	HFA License Number	12		Text	Yes	Number assigned by HFA for each license.	1012345678
5	Configuration Code	2		Text	Yes	Code designating the specific configuration licensed (FX, PH, RR). FX - Initial Server Fixation PH - Phonic Ringtone RR - Pre-Recorded Ringtone IMPORTANT NOTE: Each configuration must be reported as a separate line.	PH
6	Song Title	30		Text	Yes	Title of work for which a license was granted.	STARRY NIGHT
7	Units (For Period)	9	0	Number	Yes	Applicable number for each specific configuration shown in field #5	12345
8	Publisher Name	30		Text	Yes**	Name of the publisher owning a share of the work.	Famous
9	Publisher Ownership Share Percentage	7	4	Number	Yes**	Percent of song owned by specific publisher, as provided to licensee on license	33.3340
10	Royalty Rate	5	4	Numeric	Yes**	Royalty rate for each specific configuration shown in field #5	0.1000
11	Royalty Amount (For Period)	11	4	Numeric	Yes	Total royalties generated this period for this license.	1.2500
12	Service (ie: Third Party)	30		Text	Yes	Third party service through which the content was distributed (Each third party Service must be reported on a separate line)	RINGTONEX.COM

Note: Any characters or digits exceeding these per field maximums will be truncated.

Note: You must report by configuration(s) and units for each third party service through which content was distributed. See sample report for exam

\*\* A separate publisher share % line with corresponding publisher name must be given for each ringtone configuration if the title is not 100% payable through HFA.

**EXHIBIT CO 0040**

COPY

RINGTONE SERVICE  
LICENSING AGREEMENT

This agreement ("Agreement") is entered into as of December 1, 2003 ("Effective Date") by and between **Redacted** ("Licensee"), a New York corporation with an office at **REDACTED**, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. Licensing**

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed thirty (30) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at



any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

**3. Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2005 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

**4. Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

**5. Security**

5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.

5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.

#### 6. Royalty and Security Compliance

6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.

6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensee's Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,

along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

## **7. Termination/Default**

- 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,

notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

- 7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.
- 7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.
8. **Miscellaneous**
- 8.1. Administrative Fee. In addition to the royalties payable hereunder, within five (5) business days following execution of this Agreement, Licensee shall pay to HFA an administrative fee of **REDACTED** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder .
- 8.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:
- If to HFA:
- To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.
- If to Licensee:
- To the address set forth above. Attn: **Redacted**
- 8.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.

- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.




8.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By:   
Print name: LC Chaudhary  
Title: SVP & General Counsel

## EXHIBIT A



### Ringtone Electronic License Request & Output File Layout

**Acceptable Data Formats:**

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
3	Manufacturer Request Number	N	8	0	M
4	Ringtone Playing Time - Seconds	N	2	0	M
5	Song Title	A	200		M
6	A/K/A Song Title	A	200		O
7	ISWC Code	A	11		O
8	HFA Song Code	A	6		O
9	Song Writer(s)	A	200		M
10	Publisher Name	A	60		O*
11	HFA Publisher Number	A	6		Input/Output
12	Publisher Share	N	7	4	Input/Output
13	Catalog Number (for matching purposes only)	A	15		O
14	Configuration Code(s)	A	12		M
15	UPC Code (for matching purposes only)	A	16		O
16	License Type	A	1		M
17	Server Fixation Date	N	8	0	M
18	Rate Code	A	1		M
19	Rate In Cents	N	7	7	M
20	Artist Name (For Pre-Recorded Ringtone)	A	60		C*
21	Album Title (For Pre-Recorded Ringtone)	A	200		C*
22	Record Label (For Pre-Recorded Ringtone)	A	60		C*
23	Total Playing Time - Minutes (For Pre-Recorded Ringtone)	N	3	0	C*
24	Total Playing Time - Seconds (For Pre-Recorded Ringtone)	N	2	0	C*
25	ISRC Code (For Pre-Recorded Ringtones)	A	15		C*
26	User Defined	A	30		Input/Output
27	HFA License Number	N	10		Output
28	HFA License Status Code	A	2		Input/Output
29	HFA License Status Code 1	A	2		Output
30	HFA License Status Code 2	N	2		Output
31	HFA Flag for Amended Publisher Data	A	1		Output
32	Publisher Status	A	1		Output

**KEY:**

**TYPE:**

- A = Alphanumeric Field
- N = Numeric Field

**LENGTH:** For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required.

**DECIMAL:** Number of characters after decimal (for numeric fields only)

**INPUT OPTION:**

- M = Mandatory
- O = Optional
- O\* = Optional, however, providing this information will greatly help expedite the licensing process if the song was released within the last six months.
- C\* = Conditional -- Information mandatory if request is for a Pre-Recorded Ringtone.

\*\*\* All input/output fields should be left blank upon initial license submission, EXCEPT for Field 28 which should be populated with the letter R in the input file IF the record is a resubmission that has been amended.

## EXHIBIT B



### Ringtone Electronic Royalty Reporting File Layout

Acceptable file formats are:

- 1 MS Excel spreadsheet - please save it as type "csv" (comma separated values)
- 2 ASCII text either in a delimited (csv) or fixed width format (.txt)

#### FILE HEADER (Control Portion for File Transfer)

Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
Line Count	15	0	Number	Yes	Number of lines of data in file; used as control to verify complete and accurate file copy was received.	321456

#### FILE BODY

	Field Name	Field Length	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Yes	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	8	0	Number	Yes	Date electronic royalty report submitted to HFA Format: YYYYMMDD	20020304
3	Royalty Reporting Period	6		Text	Yes	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	30002
4	HFA License Number	12		Text	Yes	Number assigned by HFA for each license.	1012345678
5	Configuration Code	2		Text	Yes	Code designating the specific configuration licensed (FX, PH, RR). FX - Initial Server Fixation PH - Phonic Ringtone RR - Pre-Recorded Ringtone IMPORTANT NOTE: Each configuration must be reported as a separate line.	PH
6	Song Title	30		Text	Yes	Title of work for which a license was granted.	STARRY NIGHT
7	Units (For Period)	9	0	Number	Yes	Applicable number for each specific configuration shown in field #5	12345
8	Publisher Name	30		Text	Yes**	Name of the publisher owning a share of the work.	Famous
9	Publisher Ownership Share Percentage	7	4	Number	Yes**	Percent of song owned by specific publisher, as provided to licensee on license	33.3340
10	Royalty Rate	5	4	Numeric	Yes**	Royalty rate for each specific configuration shown in field #5	0.1000
11	Royalty Amount (For Period)	11	4	Numeric	Yes	Total royalties generated this period for this license.	1.2500
12	Service (ie: Third Party)	30		Text	Yes	Third party service through which the content was distributed (Each third party Service must be reported on a separate line)	RINGTONES.COM

Note: Any characters or digits exceeding these per field maximums will be truncated.

Note: You must report by configuration(s) and units for each third party service through which content was distributed. See sample report for exam

\*\* A separate publisher share % line with corresponding publisher name must be given for each ringtone configuration if the title is not 100% payable through HFA.

**EXHIBIT CO 0041**

## MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("Agreement") is being entered into as of September \_\_, 2003 (the "Effective Date"), by and between The Harry Fox Agency, Inc., having its principal place of business at 711 Third Avenue New York, 8th Floor, New York 10017 ("HFA") and **Redacted** **Redacted** having its principal place of business at ("Licensee"). Certain terms used in this Agreement have the meanings assigned to them in Section 1.

WHEREAS, HFA is the licensing and collection agent for numerous music publishers (each a "Publisher-Principal") with respect to the licensing, under Section 115 of the U.S. Copyright Act, 17 U.S.C. §115, of the manufacture and distribution of phonorecords embodying performances of copyrighted musical compositions owned or controlled by the Publisher-Principals;

WHEREAS, through recent transactions, Licensee has acquired, and owns and operates, a digital music service previously operated by **Redacted** (the "Licensed Service") which, among other things, provides access to Sound Recordings (as such term is defined in Section 101 of the U.S. Copyright Act, 17 U.S.C. §101) of Musical Works (as defined below);

WHEREAS, Licensee is authorized to make: (i) general digital phonorecord deliveries (as such term is defined in Section 115 of the U.S. Copyright Act, 17 U.S.C. § 115) pursuant to licenses issued by HFA and (ii) On-Demand Streams and Limited Downloads (as such terms are defined in an Agreement Concerning the Licensing of Certain Internet Music Subscription Services dated as of May 19, 2003 between HFA and Licensee (the "Internet Subscription Services Agreement")) pursuant to licenses issued by HFA under the terms of the Internet Subscription Services Agreement;

WHEREAS, Licensee has taken the position that no further licenses are required for its activities involving (i) the manufacture and delivery of (or having made and delivered) phonorecords of Musical Works on computer hard drives, portable consumer electronic devices and other hardware devices (as well as compact discs distributed in connection therewith, including through its Gateway Music Vault service offering) in the form of Pre-Loaded Files (as hereinafter defined), (ii) delivery of a decryption key to subscribers of the Licensed Service who request such a key, and (iii) permitting subscribers to decrypt such Pre-Loaded Files for use by such subscribers, but Licensee is willing to obtain licenses for such activities under the terms of this Agreement;

WHEREAS, HFA has taken the position that licenses are required for the activities described in the preceding clause and is prepared to grant such licenses pursuant to the terms described herein;

WHEREAS, the music industry is currently confronting a substantial challenge from widespread Internet piracy, which has caused serious harm to copyright owners and impeded the successful launch and development of legitimate online music subscription services for the downloading and streaming of music;

WHEREAS, HFA wishes to assist such legitimate online music subscription services in the successful launch and development of their services, which will benefit copyright owners and the music industry generally; and

WHEREAS, to achieve these objectives for their mutual benefit, HFA has agreed, subject to the approval of its Publisher-Principals, to issue licenses for Pre-Loaded Files, on an experimental basis for a limited period of time, pursuant to the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants, conditions and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Definitions. As used in this Agreement, the following terms have the meanings indicated:

(a) "Decryption Key" shall mean the so-called electronic "key" issued by Licensee to decrypt a Pre-Loaded File.

(b) "Device" shall mean a computer hardware device or portable consumer electronic device distributed to a User, which device has the capability to store Pre-Loaded Files and render an audible version of a sound recording to the User through use, *inter alia*, of a Decryption Key. In the case of the Pre-Loaded Files offered by Licensee as part of its Gateway Music Vault service offering, a "Device" also shall include a compact disc.

(c) "Pre-Loaded File" shall mean an encrypted digital file containing a Sound Recording of a Musical Work stored on a Device and designed to be accessed only through use of a Decryption Key.

(d) "Term" shall have the meaning assigned to it in Section 5.1.

(e) "User" shall mean any individual who accesses the Licensed Service.

(f) "Musical Work" shall mean any copyrighted musical composition owned or controlled by a Publisher-Principal and available for licensing hereunder.

## 2. License.

2.1 Subject to and in accordance with the terms, conditions, restrictions and limitations contained in this Agreement, and solely to the extent of the rights of each Publisher-Principal with respect to each Musical Work (subject to Section 2.4), HFA, on behalf of each of its Publisher-Principals, agrees to grant Licensee, in accordance with the procedures set forth in Section 2.8, during the Term and throughout the United States (as such term is defined in Section 101 of the U.S. Copyright Act, 17 U.S.C. § 101, the "Territory"), non-exclusive, non-transferable licenses, without the right to sublicense (except as specifically permitted pursuant to Section 2.7), to: (i) make, or have made, phonorecords embodying Musical Works as necessary to make and distribute, or have made and distributed, Pre-Loaded Files; and (ii) make and distribute, or have made and distributed, Pre-Loaded Files. The licenses granted herein and hereunder shall be retroactive to the inception of Licensee's and Gateway's Gateway Music Vault service offering.

2.2 The parties hereto agree that the making and delivery of Pre-Loaded Files are covered by the licenses granted pursuant to the terms hereof. The parties further agree that, to the extent a license is required, the transmission of Decryption Keys and once the Decryption Keys for Pre-Loaded Files have been transmitted to the user, the resulting decrypted Pre-Loaded Files, are licensed to Licensee under licenses granted pursuant to the terms of either this Agreement, the Internet Subscription Services Agreement and/or other licenses granted by Publisher-Principals with respect to the Musical Works.

2.3 The authority of HFA to license Musical Works, on the terms set forth herein, on behalf of its Publisher-Principals is subject to the approval of the relevant Publisher-Principals. HFA shall notify each Publisher-Principal of the terms of this Agreement, recommending that HFA issue licenses on behalf of such Publisher-Principal pursuant to the terms and conditions of this Agreement, and shall establish an opt-out period of approximately four (4) weeks before commencing to issue licenses pursuant to this Agreement. If a Publisher-Principal at any time requests that HFA not issue licenses on its behalf (either with respect to one or more particular Musical Works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a license issued prior to such request. Promptly upon the conclusion of the opt-out period, HFA shall notify Licensee of Publisher-Principals that have notified HFA that they do not wish to make licenses of their works available under this Agreement.

2.4 HFA shall issue mechanical licenses pursuant to the terms of this Agreement with respect to a Musical Work in its entirety if one or more of its Publisher-Principals owns or controls a partial interest in such Musical Work, even if other co-owners of such Musical Work are not Publisher-Principals, except that, pursuant to Section 2.3, if all of the Publisher-Principals that own or control such Musical Work request that HFA not issue licenses on their behalf, HFA will not issue such licenses.

2.5 For the reasons set forth above, the licenses granted pursuant to the terms hereof shall be made on a gratis basis, subject to the terms and conditions set forth herein.

2.6 The rights granted by HFA pursuant to the terms hereof on behalf of the Publisher-Principals are non-exclusive and limited to use of the Musical Works in the manner expressly described in this Agreement. Any and all other rights held by HFA and its Publisher-Principals that are not specifically granted herein are reserved by HFA and its Publisher-Principals, and their designees, including without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to synchronize Musical Works with visual images resulting in audiovisual works, karaoke rights, rights in lyrics and other rights not contemplated by Section 115 of the Copyright Act.

2.7 Licensee shall obtain HFA's prior written approval (such approval not to be unreasonably withheld, and such approval to be deemed given if not granted within five business days after receipt by HFA of such a request from Licensee in accordance with Section 8.2 hereto) before it authorizes any third party, under its have-made rights pursuant to Section 2.1, to make Pre-Loaded Files; provided that the manufacturers listed on Exhibit A hereto shall be deemed to be approved manufacturers pursuant to this Section 2.7. Notwithstanding the foregoing, HFA hereby acknowledges, retroactive to the inception of Licensee's Gateway Music Vault service offering, Licensee's rights to authorize Gateway, Inc. to make Pre-Loaded Files in accordance with the terms of the license. Licensee shall be responsible for ensuring compliance by any such third party with the terms of this Agreement and any breach of this Agreement by any such third party shall be deemed a breach by Licensee.

2.8 Licensee hereby requests licenses hereunder for all musical works as to which Licensee is, as of the Effective Date, authorized to make digital phonorecord deliveries under licenses issued by HFA under the terms of the Internet Subscription Services Agreement or other licenses issued by HFA. Within a reasonable period after the expiration of the opt-out period described in Section 2.3, such licenses shall be issued by HFA as to all such Musical Works as to which the relevant Publisher-Principals have not requested that licenses be withheld, retroactively to the inception of the Gateway Music Vault service. On a prospective basis, Licensee (or a label designee acting on behalf of Licensee) shall submit license requests in electronic form, either individually or batched, in accordance with the license request form attached hereto as Exhibit B, as such form may be revised reasonably by HFA from time to time, specifying that such license is being sought for Licensee for the "Pre-Loaded File" configuration; provided that, for Musical Works previously licensed, HFA will ordinarily only require the existing HFA license number for such Musical Works. The parties each acknowledge the importance to HFA and its Publisher-Principals of having license requests submitted promptly, and the importance to Licensee of having the license forms issued promptly. The parties shall cooperate in good faith with respect to all licensing procedures in order to promote each of these goals. In the event Licensee would like the record labels to seek licenses for Pre-Loaded Files directly from



HFA, HFA agrees to cooperate in good faith with Licensee in order to formulate an arrangement for such licensing of Pre-Loaded Files.

### 3. Covenants.

3.1 Licensee shall incorporate, as part of the distribution of Pre-Loaded Files of Sound Recordings of Musical Works to existing and prospective Users and other persons, a security technology that is intended to prevent an actual or prospective User or other person from accessing any Musical Work in the Pre-Loaded File without the use of the Decryption Key.

3.2 To the extent that the Licensed Service uses third party technology in order to satisfy the requirements of Section 3.1, Licensee shall use its commercially reasonable efforts to maintain and upgrade such technology by diligently monitoring any third-party announcement made available to Licensee of bug-fixes, security holes and functionality improvements, obtaining such upgrades, and installing and distributing such upgrades as reasonably necessary to maintain the integrity of the Licensed Service against unauthorized access to Pre-Loaded Files without the use of the Decryption Key.

3.3 Licensee shall use its reasonable best efforts to prevent the creation of any unauthorized copies of any licensed Musical Works in any facilities in its control in any form (including but not limited to, copies created by employees or contractors outside the immediate scope of their employment), and shall use its commercially reasonable efforts to prevent the creation of such unauthorized copies by any users. If Licensee learns of any circumvention of the technology used to satisfy the requirements of Section 3.1 above that allows a substantial number of Users to have unauthorized access to Pre-Loaded Files without the use of the Decryption Key (each, an "Unauthorized Use"), Licensee shall promptly provide HFA with written notification of such Unauthorized Use and use commercially reasonable efforts to secure its technology against such Unauthorized Use to the satisfaction of HFA within forty-five (45) days of Licensee's learning of such Unauthorized Use. At HFA's request, Licensee shall suspend all distribution of Pre-Loaded Files of Musical Works under this Agreement pending Licensee's securing its technology against such Unauthorized Use to the reasonable satisfaction of HFA. If Licensee fails so to suspend such distribution, or following such suspension Licensee fails to secure its technology against such Unauthorized Use to the satisfaction of HFA within such forty-five (45) day period, then HFA shall have the right to terminate this Agreement immediately upon notice to Licensee.

### 4. Reporting and Consultation.

4.1 In addition to its obligations under its existing licenses, Licensee shall account to HFA on a quarterly basis for activity under licenses granted pursuant to the terms hereof, within forty-five (45) days after the close of each quarter in which such activity occurred. The first such report shall not be due until forty-five (45) days after the close of the quarter during which this Agreement is executed, and shall cover the period from the inception of Licensee's Gateway Music Vault service through

the close of such quarter. The report shall include (i) the names of manufacturers for which, and the product lines of devices on which, the Pre-Loaded files were made and distributed and (ii) for each manufacturer and product line of device, the total number of Pre-Loaded Files of Musical Works made and distributed. The number of Pre-Loaded Files of each Musical Work for which a Decryption Key was delivered to a User will be aggregated with Limited Downloads delivered under, and reported to HFA under, the Internet Subscription Services Agreement. Such reports, which shall be substantially in the form exemplified in Exhibit C hereto, shall identify each such Musical Work by title and include, without limitation, the HFA license number, the ISRC number if available and the catalog number if available.

4.2 At HFA's request, Licensee shall consult with HFA at least monthly with respect to Licensee's activities under this Agreement. As part of such consultation, Licensee shall advise HFA in writing of any new offerings of Pre-Loaded Files that it intends to launch in the subsequent ninety (90) days.

4.3 HFA shall be entitled, upon thirty (30) days' prior written notice, during the Term or the six (6) months following the Term, to conduct an examination of the books, records and security technologies of Licensee to determine whether Licensee is in compliance with its reporting and security obligations under this Agreement during Licensee's usual business hours, at the place where Licensee keeps such books and records to be examined. HFA may make such an examination under this Agreement no more than twice.

## 5. Term and Termination.

5.1 Unless terminated earlier in accordance with the terms set forth herein, the initial term of this Agreement shall be one year from the Effective Date (the "Initial Term") and shall automatically renew for a single additional six (6) month period unless either party notifies the other in writing at least thirty (30) days before the end of the Initial Term that it does not wish to extend the Agreement (such additional six-month period, together with the Initial Term, the "Term").

5.2 Upon the expiration or other termination of this Agreement, all license authority under this Agreement and pursuant to any licenses issued under this Agreement shall terminate, without prejudice to any rights that Licensee may have to engage in similar activities under any other agreement or otherwise. To the extent that Pre-Loaded Files have been distributed by or for Licensee pursuant to licenses issued hereunder prior to the expiration or other termination of this Agreement, Licensee may continue to transmit Decryption Keys therefor, and Users may continue to access the decrypted Pre-Loaded Files, and the provisions of Sections 2.2 and 4.1 shall apply.

5.3 In addition to such other rights and remedies which HFA or the Publisher-Principals may have at law or otherwise under this Agreement (including, without limitation, the right to enforce performance hereof, including specific performance), HFA and the Publisher-Principals shall have the right to terminate this Agreement immediately (subject to the provisions of Section 5.3.4 below)

upon notice to Licensee and all rights granted hereunder shall forthwith revert to the Publisher-Principals, upon the occurrence of any one or more of the following events, which shall be deemed material breaches and defaults by Licensee hereunder:

5.3.1 Licensee's breach of Section 3.3, in accordance with the provisions thereof;

5.3.2 To the extent permitted by applicable law, Licensee's dissolution, insolvency or the liquidation of Licensee's assets, or the commission of an act for, or in, bankruptcy or the filing of a petition in bankruptcy or insolvency or for an agreement or reorganization, by, for or against Licensee, or the appointment of a receiver or a trustee for all or a portion of Licensee's property, or an assignment by Licensee for the benefit of creditors;

5.3.3 Except as expressly permitted under Section 2.7, Licensee's attempt to sublicense or assign any rights licensed hereunder without HFA's prior written consent; and

5.3.4 Except for the breaches set forth in Sections 5.3.1, 5.3.2 and 5.3.3, for which no cure period is provided, Licensee's breach of any material representation, warranty or agreement or any other obligation in this Agreement, which breach remains uncured thirty (30) days after written notice by HFA thereof.

6. Survival. Following termination of this Agreement for any reason, the following Sections shall survive (inclusive of subparts): 1, 4.1, 4.3, 6, 7 and 8.

7. Assignment. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. Neither party shall assign its respective rights and obligations, in whole or in part, under this Agreement without prior written consent of the other party.

8. Miscellaneous.

8.1 Nature of Agreement. The parties are entering into this Agreement on an experimental basis and solely to settle disputed matters with respect to which this Agreement shall not constitute an admission or evidence of the positions of either party. In keeping therewith, the parties agree that (i) the royalty rate and other arrangements set forth in this Agreement shall have no precedential effect in any subsequent negotiations or proceedings, (ii) this Agreement shall not be used by either party as evidence either that a license is or is not required for or in connection with Pre-Loaded Files or that the Internet Subscription Services Agreement does or does not cover Pre-Loaded Files, and (iii) neither of the parties, nor any third party authorized by Licensee to engage in activities pursuant to the licenses issued under this Agreement, may rely on this Agreement or any of the negotiations associated herewith to make any claim to the contrary. In the event that Licensee pays its licensors of Sound Recordings additional royalties (i.e. in addition to those royalties otherwise payable in respect of On Demand Streams and Limited Downloads) in excess of

**Redacted** for licensing the Sound Recording rights for Pre-Loaded Files, Licensee

shall have ninety (90) days in which to make an offer to publishers to pay royalties for the activities licensed hereunder. If Licensee fails to make such an offer, this Agreement and the licenses granted pursuant to the terms hereof shall terminate and the provisions of Section 5.2 shall apply.

8.2 Notices. All notices, requests, demands, or other communications required or permitted under this Agreement shall be in writing and shall be delivered by hand, sent by facsimile transmission, or mailed, postage prepaid, by registered, certified or express mail or reputable overnight courier service and shall be deemed given when so delivered by hand, or by facsimile (with confirmation of receipt) or if mailed, three days after mailing (one business day in the case of express mail or overnight courier service), as follows:

(a) if to HFA:

The Harry Fox Agency  
711 Third Avenue  
New York, New York 10017  
Attention: President  
Telephone: (212) 922-3260  
Facsimile: (212) 953-2471

and to:

The Harry Fox Agency  
711 Third Avenue  
New York, New York 10017  
Attention: Jacqueline C. Charlesworth  
Telephone: (212) 922-3266  
Facsimile: (212) 922-3299

with a copy to:

Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, New York 10019-6064  
Attention: Carey R. Ramos, Esq.  
Telephone: (212) 373-3340  
Facsimile: (212) 373-2380

(b)

Redacted

With a copy to:

Arnold & Porter

Attention: Steve Englund  
Telephone: (703) 720-7009

8.3 Entire Understanding. This Agreement contains the entire understanding of the parties hereto relating to the subject matter hereof and cannot be changed or terminated except by a written instrument signed by an officer of HFA and an officer of Licensee. The parties hereto are sophisticated and have had the opportunity to be represented by lawyers throughout the negotiation of this Agreement. As a consequence, the parties do not believe that the presumptions of any laws or rules relating to the interpretation of contracts against the drafter of any particular clause should be applied in this case and therefore waive their effects.

8.4 Severability; Waiver. Should any part of this Agreement judicially be declared to be invalid, unenforceable, or void, the parties agree that the part or parts of this Agreement so held to be invalid, unenforceable, or void shall be reformed by the entity having jurisdiction thereover without further action by the parties hereto and only to the extent necessary to make such part or parts valid and enforceable. A waiver by either party hereto of any of the covenants to be performed by the other party or any breach thereof shall not be effective unless made in writing and signed by the waiving party and shall not be construed to be a waiver of any succeeding breach thereof or of any covenant herein contained.

8.5 Relationship of the Parties. Each party is acting as an independent contractor and not as an agent, partner, or joint venturer with the other party for any purpose. Except as provided in this Agreement, neither party shall have any right, power, or authority to act or to create any obligation, express or implied, on behalf of the other.

8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with the laws of the State of New York, without regard to conflict of laws principles. The parties agree that any actions or proceedings arising by reason of any breach of this Agreement shall be brought and maintained in a court of appropriate jurisdiction within the County of New York, City of New York.

8.7 Counterparts. This Agreement may be executed simultaneously or in one or more actual or telecopied counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same instrument. The parties hereto confirm that any facsimile copy of another party's executed counterpart of this Agreement (or its signature page thereof) will be deemed to be an executed original thereof.

IN WITNESS WHEREOF, the parties hereto have caused their  
authorized representatives to execute this Agreement.

THE HARRY FOX AGENCY, INC.

By:   
\_\_\_\_\_  
Gary D. Churgin  
President & CEO

Redacted



Exhibit A

Approved Manufacturers

Apple  
HP/Compaq  
Dell  
Gateway  
Sony  
eMachines  
Samsung  
Toshiba  
Panasonic  
Sharp  
Allenware  
Northgate  
IBM  
Walmart  
Apple  
Samsung  
Sony  
Rio  
Creative  
Sanyo/Fisher  
Archos  
RCA (Thomson)  
eDigital  
Pioneer  
Intel  
Phillips  
Best Buy  
Private label devices by any of the above

Phillips  
Best Buy

## HFA/RIAA Electronic License File Field Definitions

	Field	Type: Mandatory (M) Optional (O) Conditional (C)"	Explanation	Example
1	Manufacturer Number	M	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	M	Date electronic license request submitted to HFA	"Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
3	Manufacturer Request Number	M	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested	12345678
4	Label Name	M	The name of the record label that produced the applicable recording	Epic
4	Label Name	M	The name of the record label that produced the applicable recording	Epic
6	Playing Time - Minutes	M	The number of minutes in the duration of the applicable recording	"Duration = 5 minutes and 52 seconds Data entered: 005
7	Playing Time - Seconds	M	The number of seconds in the duration of the applicable recording	"Duration = 5 minutes and 52 seconds Data entered: 052
8	Artist	M	The name of the artist performing the applicable recording	Beatles
9	Song Title	M	Title of work for which a License is requested	Yesterday
10	A/K/A Song Title	O	Other names by which the work is known	Over the Rainbow; Somewhere Over the Rainbow
11	ISWC Code	O	International Standard Musical Work Code. Code assigned to works by the network of ISO/ISWC Local or Regional agencies	Example: T-034.524.680-1 Data Entered: T0345246801



	Field	Type: Mandatory (M) Optional (O) Conditional (C)"	Explanation	Example
12	HFA Song Code	O	Identifier assigned by HFA to identify a work uniquely	Example: Y12345
13	Songwriter(s)	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of the composer(s) of the work.	Format: [First Name] [Last Name], [First Name], etc Example: Michael Ross, Tom Smith
14	Publisher Name	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of publisher owning a share of the work. Additional publishers should be listed on separate lines using the same manufacturer's request number assigned to the work.	EMI Mills
15	HFA Publisher Number	O	Identifier assigned by HFA to identify a publisher uniquely.	P12345
16	Publisher Share	O	Percent of song owned by publisher.	Example: 66.667% Data Entered: 066.6670
17	Catalog Number	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The catalog number of a prior physical product that has been previously licensed (where applicable.)	12345-2
18	Album (physical product) Title	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The title of a prior physical product that has been previously licensed (where applicable)	Parachute
19	UPC Code	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The UPC code of a prior physical product that has been previously licensed (where applicable).	706301594728

	Field	Type: Mandatory (M) Optional (O) Conditional (C)"	Explanation	Example
20	Configuration Code	M	Code designating configuration type(s) applicable. Numerous options available; most relevant are in example column.	CV = Covered Services under the RIAA Agreement only (includes LT, LU and S below) LT = Time-Limited Digital Phonorecord Delivery LU = Use Limited Digital Phonorecord Delivery S = On-Demand Streaming (Single) SA = On-Demand Streaming (Album) FX = Fixation SP = Digital Phonorecord Delivery (Full download)
21	License Type	M	Classification of license type requested.	G = Digital D = Physical Product (Domestic) I = Physical Product (Import)
22	Server Fixation Date	M	The date the applicable recording was or is expected to be fixed to the server for distribution via streaming or downloading.	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304

	Field	Type: Mandatory (M) Optional (O) Conditional (C)"	Explanation	Example
23	Rate Code	C (one of the rate fields from 23 – 26 must be completed)	Code designating type of rate applicable. Numerous options available; most relevant are in example column.	T = Statutory rate to be determined under RIAA Agreement R = Under controlled composition clause in contract where controlled rate applies S = Statutory (already determined) N = Negotiated
24	Rate in Cents	C (one of the rate fields from 23 – 26 must be completed)	Rate indicated as a penny rate.	0.0755
25	Rate in Percentage of Statutory	C (one of the rate fields from 23 – 26 must be completed)	Rate indicated in percentage of statutory.	75
26	Rate in Percentage of Minimum Statutory	C (one of the rate fields from 23 – 26 must be completed)	Rate indicated in a percentage of minimum statutory.	75
27	HFA License Number	Output	Number assigned by HFA for each license	1010120001
28	HFA License Status Code #1	Input/Output	Input: Use to designate amended record - use code R in field Output: Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	Input: R = indicates this record has been amended and is being resubmitted Output: 03 = Duplicate License Request (2nd Pass, Already Licensed, Part of Edit Validation Process)
29	HFA Flag for Amended Publisher Data	Output	Indicates that publisher information submitted by licensee differs on HFA database (for HFA represented publishers only)	Y = Flagged so that requestor can note that HFA publisher information differs from that submitted

	Field	Type: Mandatory (M) Optional (O) Conditional (C)"	Explanation	Example
30	Publisher Category Code	Output	Publisher Category Code.	Blank = Opt In HFA Publisher N = Non-HFA Publisher D = Opt In HFA Publisher, licensing direct to Licensee (i.e., affiliated with Licensee) B = Opt Out HFA Publisher, or Song blocked by Publisher
31	Total HFA Represented Share	Output	Total % of work represented by HFA	Example: 66.667% Data Entered: 066.6670
32	HFA License Status Code #2	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	03 = Duplicate license request (2nd Pass, Already Licensed, part of Edit Validation Process)
33	HFA License Status Code #3	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	03 = Duplicate License Request (2nd Pass, Already Licensed, Part of Edit Validation Process)
34	User Defined	Input/Output	This field is reserved for and defined by each record company. HFA will send back this information in the output file.	



# HFA/RIAA Electronic License Request & Output File Layout

Acceptable Data Formats:

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
2	Transaction Date	N	8	0	M
4	Label Name	A	15		M
4	Label Name	A	15		M
6	Playing Time - Minutes	N	3	0	M
7	Playing Time - Seconds	N	2	0	M
8	Artist	A	200		M
9	Song Title	A	200		M
10	A/K/A Song Title	A	200		O
11	ISWC Code	A	11		O
12	HFA Song Code	A	6		O
13	Song Writer(s)	A	200		C*
14	Publisher Name	A	60		C*
15	HFA Publisher Number	A	6		O
16	Publisher Share	N	7	4	O
17	Catalog Number	A	15		C*
18	Album (physical product) Title	A	200		C*
19	UPC Code	A	16		C*
20	Configuration Code	A	2		M
21	License Type	A	1		M
22	Server Fixation Date	N	8	0	M
23	Rate Code	A	1		C**
24	Rate in Cents	N	7	7	C**
25	Rate in Percentage of Statutory	N	5	2	C**
26	Rate in Percentage of Minimum Statutory	N	5	2	C**
27	HFA License Number	N	10		Input/Output
28	HFA License Status Code #1	A	2		Input/Output
29	HFA Flag for Amended Publisher Data	A	1		Input/Output
30	Publisher Status	A	1		Input/Output
31	Total HFA Represented Share	N	7	4	Input/Output
32	HFA License Status Code #2	A	2		Input/Output
33	HFA License Status Code #3	A	2		Input/Output
34	User Defined	A	30		Input/Output

## KEY: TYPE:

A = Alphanumeric Field

**N = Numeric Field**

**LENGTH:** For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required

**DECIMAL:** Number of characters after decimal (for numeric fields only)

**INPUT OPTION:**

**M = Mandatory**

**O = Optional**

**C\* = Conditional ---** As agreed, label must provide either: (a) Songwriter or (b) Publisher, Catalog Number, Album Title and UPC. If (a) is provided, then (b) is not required; and vice versa.

**C\*\* = Conditional ---** One of the rate code fields from 23-26 must be completed

**\*\*\*All input/output fields should be left blank upon initial license submission, EXCEPT for Field 29**

**which should be populated with the letter R in the input file IF the record is a resubmission that has been amended.**

## ELECTRONIC ROYALTY REPORT FILE LAYOUT

	Field Name	Field Length**	Decimal Places	Field Format	Mandatory Field	Field Description/Legend	Example
1	Manufacturer Number	8		Text	Yes	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	8	0	Number	Yes	Date electronic royalty report submitted to HFA. Format: YYYYMMDD	20010304 (3/4/2001)
3	Royalty Reporting Period	6		Text	Yes	Length of period in number of months (left 2 digits), ending month (middle 2 digits), year (right 2 digits)	030601 (i.e., quarterly reporting period, ending the 6th month of 2001.)
4	HFA License Number	12		Text	Yes	HFA License Number	1010610541
5	ISRC	15		Text	Conditional	International Standard Recording Code. Either the ISRC Code or UPC Code must be submitted.	USEM397001 74
6	UPC	16		Text	Conditional	UPC Code. Either the ISRC Code or the UPC Code must be submitted.	7.06302E+11
7	Configuration Code	2		Text	Yes	Code designating the specific format or medium licensed	SP
8	HFA Song Title	30		Text	Yes	Title of work being licensed	White Christmas
9	Manufacturer Request Number	15		Text	Yes	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested	54321
10	Sales Channel	5		Text	Conditional	Field specifying the specific sales channel through which the content was delivered (i.e.: CD burn)	
11	Units (For Period)	9	0	Number	Yes	Applicable number of Permanent Downloads	4
12	Units (To Date)	9	0	Number	Yes	Applicable number of On-Demand Streams, Time-Limited Downloads, Use-Limited Downloads, or Permanent Downloads, etc. Recorded to date	12345
13	Royalty Rate	5	4	Numeric	Yes	Applicable "Payment per Download"	0.08
14	Royalty Amount (For Period)	11	4	Numeric	Yes	Units x Royalty Rate.	.80
15	Royalty Amount (To Date)	11	4	Numeric	Yes	Total Royalties Generated To Date	54.32
16	Service (i.e., Third Party)	30		Text	Conditional	Third party service through which the content was distributed	MUSICSERV ICE.COM

**\*\* Any characters or digits exceeding these per field maximums will be truncated.**  
**Note: Please use UPPERCASE for all data entries.**



## ROYALTY REPORTING GUIDE

a) Covered Services

- Covered Services must be broken down via sales channel by streams, limited use, and limited time downloads. The rates for these three items are to be determined.

b) Full Downloads and CD Burns

- Full downloads must be broken down by full downloads and CD burns.
- In order to offer the ability for users to burn copies of songs onto CDs, a licensee needs to apply for licenses to offer full downloads, or DPDs, of musical works through its service (the "SP" configuration). Once a licensee has secured such licenses, it needs not obtain additional license authority for the CD burns, *provided however, that it accounts for the burns separately under the sales channel code "DB" (for DPD burn) in its quarterly electronic statements.* As full DPDs, CD burns are to be paid at the statutory rate (or such other rate as may have been approved by the publisher).
- Royalty payments should be submitted for DPD and CD burns.

c) This table summarizes the above for use in reporting:

Item	Configuration Code	Sales Channel	Royalty Rate	Royalty Remission
Covered Service - Stream	CV	S	To be determined	none
Covered Service - Limited Use	CV	UL	To be determined	none
Covered Service - Limited Time	CV	TL	To be determined	none
Download - Digital Phono Delivery (DPD)	SP	SP	Statutory rate (or other rate approved by publisher)	Stat or other
Download - CD Burn	SP	DB	Statutory rate (or other rate approved by publisher)	Stat or other

**EXHIBIT CO 0042**

**RINGTONES SERVICE  
LICENSING AGREEMENT**



This agreement ("Agreement") is entered into as of September 10, 2003 ("Effective Date") by and between **Redacted** ("Licensee"), a Delaware corporation with an office at **Redacted**, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. Licensing**

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed forty-five (45) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at

any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

3. **Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2005 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

4. **Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

5. **Security**

5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.

5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.

#### 6. Royalty and Security Compliance

6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.

6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensees' Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,



along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"; and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 7. Termination/Default
  - 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,

notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

- 7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.
- 7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.
8. Miscellaneous
- 8.1. Administrative Fee. In addition to the royalties payable hereunder, within five (5) business days following execution of this Agreement, Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder.
- 8.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

To the address set forth above. Attn: **Redacted**

- 8.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.

- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.

8.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By: JCH  
Print name: JC Chandlerworth  
Title: SVP & General Counsel

**EXHIBIT CO 0043**

RINGTONE SERVICE  
LICENSING AGREEMENT

COPY

This agreement ("Agreement") is entered into as of September 5, 2003 ("Effective Date") by and between **Redacted** ("Licensee"), a Colorado corporation with an office at **REDACTED** and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. Licensing**

- 1.1** Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed thirty (30) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at



any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted**; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

**3. Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2005 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

**4. Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

**5. Security**

5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.

5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.

#### 6. Royalty and Security Compliance

6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.

6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensees' Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,

along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

#### **7. Termination/Default**

- 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,

notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

- 7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.
- 7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.

8. Miscellaneous

- 8.1. Administrative Fee. In addition to the royalties payable hereunder Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder, in accordance with the following schedule:

**Redacted**

- 8.2 Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

To the address set forth above.

**Redacted**

- 8.3 Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.
- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.



8.10 Counterparts. This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By: \_\_\_\_\_

Print name:

Title: SVP

J C Charlesworth  
§ General Counsel

**EXHIBIT CO 0044**

COPY

**RINGTONES SERVICE  
LICENSING AGREEMENT**

This agreement ("Agreement") is entered into as of September 5, 2003 ("Effective Date") by and between ("Licensee"), a Canadian corporation with an office at **Redacted REDACTED**, and The Harry Fox Agency, Inc. ("HFA"), a New York corporation with an office at 711 Third Avenue, New York, NY 10017.

WHEREAS, Licensee owns and operates a service pursuant to which excerpts of copyrighted musical compositions ("Musical Works") in the form of Ringtones (as below defined) are digitally reproduced on a central computer server or servers, which Ringtones are subsequently transmitted from such servers and downloaded to Covered Devices (as below defined) ("Service"); and

WHEREAS, in order to operate the Service, Licensee seeks licenses to make Server Fixations (as below defined) and reproduce and distribute Ringtones of Musical Works that are owned and/or controlled by publisher-principals affiliated with HFA ("Publisher-Principals"); and

WHEREAS, HFA is prepared to issue such licenses to the extent it is authorized to do so by such Publisher-Principals;

NOW, THEREFORE, in consideration of the promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. Licensing**

- 1.1 Pursuant to the terms of this Agreement, and as more particularly described herein, upon receipt of appropriate license requests ("License Requests") from Licensee, HFA shall, to the extent authorized by particular Publisher-Principals, issue on behalf of such Publisher-Principals nonexclusive licenses ("Licenses") to reproduce and distribute Ringtones of Musical Works owned and/or controlled by such Publisher-Principals ("Licensed Works") for use on Licensee's Service in accordance with the terms of this Agreement. The license authority contemplated hereunder and granted pursuant to any License issued hereunder shall include and is limited to: (a) the digital reproduction of Ringtones of Licensed Works on a central computer server or servers owned and/or controlled by Licensee and located in the United States (including its territories and possessions and the Commonwealth of Puerto Rico (collectively, the "United States")) ("Servers"), solely for use in connection with the Service ("Server Fixations"); (b) the digital transmission of Ringtones of Licensed Works from such Servers for storage on Covered Devices, solely for use in connection with the Service; (c) the reproduction of Ringtones of Licensed Works on Covered Devices, solely for use in connection with the

Service ("Ringtone Deliveries"); and (d) the offering of Promotional Ringtones (as below defined) of Licensed Works, solely for use in connection with the Service. The license authority under any License issued hereunder is limited to and granted solely with respect to (x) the copyright interests of the individual Participating Publisher-Principal(s) on whose behalf the License is issued by HFA; and (y) if the Ringtone is a Pre-Recorded Ringtone (as below defined), the particular individual sound recording of the individual Licensed Work from which the excerpt embodied in the Ringtone was derived.

For purposes of this Agreement:

A "Ringtone" is an excerpt, not to exceed thirty (30) seconds, of a musical composition that is embodied in either (i) a digital file containing codes representing and capable of being rendered into audio and played back as musical notes constituting the work's melody in either monophonic or polyphonic form ("Phonic Ringtone"), or (ii) a digital file representing an excerpt of no more than thirty (30) seconds of a sound recording of the composition ("Pre-Recorded Ringtone"); in both cases, that is intended to be digitally transmitted to and stored in an end user's Covered Device and played by such intended destination Covered Device whenever the Covered Device activates its ringing or alert function indicating the arrival of a call, message or other notification received by the Covered Device, and is designed to be played by such Covered Device without any other distribution or transmission.

A "Covered Device" shall mean a mobile telephone, pager or other portable communications device with a telephonic or messaging function that operates on a wireless communications network regulated by the U.S. Federal Communications Commission pursuant to its rules governing commercial mobile radio services.

A "Promotional Ringtone" shall mean a digital transmission of a Ringtone in streamed form made available to a prospective purchaser free of charge and solely for the purpose of promoting the sale of the Ringtone, and that does not result in a reproduction of any part or all of the Ringtone that is accessible except by such prospective purchaser for an intended one-time promotional playback through the operation of a Covered Device or other device.

- 1.2 The authority of HFA to issue Licenses for any individual Musical Work on behalf of any one or more Publisher-Principals is subject to the approval of the relevant Publisher-Principal(s). Before commencing to issue licenses hereunder, HFA shall for a period of time (the "Opt-In Period") offer to its Publisher-Principals the opportunity to agree to make their Musical Works available for licensing under this Agreement by notifying HFA of their desire to opt in to the Agreement. Notwithstanding the decision to opt in by any individual Publisher-Principal, thereby rendering such Publisher-Principal a "Participating Publisher-Principal," if such Participating Publisher-Principal at

any time requests that HFA not issue Licenses on its behalf (either with respect to a particular Musical Work or in general), HFA will honor that request; provided, however, that any Licenses validly issued by HFA prior to the receipt of such a request shall remain in effect until the Term (as below defined) of this Agreement expires.

- 1.3 Following execution of this Agreement and conclusion of the Opt-In Period, Licensee may begin submitting License Requests in electronic form in accordance with the format specified in Exhibit A (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Request Format"), which License Requests shall be duly processed by HFA. Without limitation, Licensee shall include in each License Request to the extent required by the Request Format (a) the title of the Musical Work for which a License is being requested; (b) the writer(s) of the Musical Work; (c) the publisher(s) of the Musical Work; and (d) whether the Ringtone is to be licensed in the form of a Phonic Ringtone and/or a Pre-Recorded Ringtone; and, if the Ringtone is a Pre-Recorded Ringtone, (e) the name of the record company that produced the sound recording embodied in the Ringtone; (f) the name of the artist performing such sound recording; (g) the ISRC number for such sound recording; (h) the total playing time of such sound recording in its complete form, expressed in minutes and seconds; (i) the title of an album for which such sound recording has been previously licensed; and (j) such other information as may be required by HFA's Request Format.
- 1.4 HFA shall from time to time provide to Licensee an electronic file specifying the Licenses issued under this Agreement (each such report a "Confirmation Report"). To aid Licensee in the calculation of royalties, with respect to each License, such Confirmation Report shall include, *inter alia*, the total percentage ownership share of the Participating Publisher-Principal(s) on whose behalf the License has been issued.
- 1.5 For the avoidance of doubt, and without limitation, the Licenses granted hereunder do not extend to or cover: (a) any right of public performance; (b) any copyrights or other rights in sound recordings; (c) any rights to synchronize musical works with visual images resulting in audiovisual works; (d) any print, display or karaoke rights; (e) any adaptation (derivative work) rights; (f) any merchandising rights; (g) any use of a musical work (whether or not embodied in a sound recording) for a marketing campaign, product tie-in, game or contest or otherwise to advertise, promote or cross-promote any product or service; or (h) any use of the title of a musical work, or the name or likeness of any writer, publisher or artist associated with a musical work, except for identification purposes as described in Section 4.
- 1.6 The license authority contemplated by this Agreement and granted pursuant to any License issued hereunder is limited to Licensee and may not be sublicensed, assigned or otherwise transferred by Licensee except to the extent expressly permitted hereunder.

2. Reporting and Payment of Royalties

- 2.1 Licensee shall account and pay royalties to HFA quarterly, within forty-five (45) days after the end of each calendar quarter, on the basis of (a) the initial Server Fixation of a particular individual Phonic Ringtone or Pre-Recorded Ringtone of a Licensed Work made on any Server (but not any subsequent Server Fixation of the identical Phonic Ringtone or Pre-Recorded Ringtone made on the same or any other Server) ("Initial Server Fixation"); and (b) each Ringtone Delivery in the form of a Phonic Ringtone ("Phonic Ringtone Delivery") or Pre-Recorded Ringtone ("Pre-Recorded Ringtone Delivery"). Licensee shall provide its quarterly statements ("Statements") in electronic form in accordance with the format specified in Exhibit B (as such format may be modified from time to time by HFA upon reasonable notice to Licensee) ("Reporting Format"). With respect to each quarterly reporting period, for each License, Licensee shall include in its Statement (t) the HFA License number; (u) whether an Initial Server Fixation was made; (v) the total number of Phonic Ringtone Deliveries and/or total number of Pre-Recorded Ringtone Deliveries, as the case may be; (w) the particular retail outlet through which each Ringtone Delivery was made; (x) the royalty amount being paid for the Initial Server Fixation; (y) the total royalty amount being paid for the Phonic Ringtone Deliveries and/or Pre-Recorded Ringtone Deliveries; and (z) such other information as may be required by HFA's Reporting Format. Interest on late payments shall be payable to HFA at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.
- 2.2 For each Initial Server Fixation, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.
- 2.3 (a) For each Phonic Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work. (b) For each Pre-Recorded Ringtone Delivery, the royalty shall be **Redacted** ; provided, however, that this amount shall be proportionately reduced to the extent that the Participating Publisher-Principal(s) on whose behalf the License is granted own(s) or control(s) less than 100% of the Work.

**3. Term**

The term of this Agreement shall commence as of the Effective Date and terminate on December 31, 2005 (the "Term"). If Licensee wishes to renew this Agreement for an additional two (2) year term, it shall notify HFA of such desire not later than a date six (6) months prior to the end of the Term. Such notification shall include proposed terms for any such renewal. Any renewal shall be subject to the approval of individual Publisher-Principals as described in Subsection 1.2, and HFA reserves the right to propose changes to administrative and other aspects of the Agreement as it deems appropriate.

**4. Writer/Publisher Credit**

Licensee shall, to the extent commercially reasonable, include in any graphics and/or imagery displayed in connection with the play of any Ringtone of a Licensed Work written credit in legible form setting forth the names of the writer(s) and publisher(s) of such Licensed Work.

**5. Security**

5.1 In connection with the use of any Licensed Work, Licensee shall implement and maintain copy protection and digital rights management technology and systems, including software and/or hardware functional limitations (collectively, "Security Systems") with respect to all aspects of the Service, including without limitation its Servers and operating systems, that (a) are designed to prevent unauthorized reproduction and distribution of the Licensed Work, in the form of Ringtones or otherwise; (b) are sufficient to track and enforce the use limitations contemplated by this Agreement; and (c) meet or exceed current industry standards as they exist from time to time for the licensed delivery of music via digital transmission and its reproduction on devices including, without limitation, Covered Devices.

5.2 In the event it becomes aware of a breach of Licensee's Security Systems ("Security Breach"), whether through its own monitoring efforts, upon being advised by another party (including HFA) or otherwise, Licensee shall use its best efforts to resolve the Security Breach and restore the full integrity of its Security Systems as quickly as possible. If a solution to the Security Breach is not immediately available (i.e., cannot be implemented within twenty-four (24) hours from the time Licensee becomes aware of the Security Breach), Licensee shall (a) promptly notify HFA of the Security Breach in writing (unless Licensee learned of the breach from HFA); and (b) cease all further digital transmission and/or reproduction of Licensed Works to the extent such activities are or could possibly be affected by the Security Breach, pending full resolution of the Security Breach. In such a case, Licensee (x) shall keep

HFA reasonably apprised of the status of its efforts to resolve the Security Breach; and (y) shall not resume the activities that were suspended pursuant to this Subsection 5.2 until the full integrity of its Security Systems has been restored.

5.3 To the extent Licensee employs third-party technology in order to operate, Licensee shall use its best efforts to maintain and upgrade such technology by (a) diligently monitoring any third-party notifications of bug-fixes, security holes and functionality improvements; and (b) obtaining any available upgrades and bug-fixes, and installing, testing and distributing such upgrades and bug-fixes as necessary so as to maintain the integrity of its Security Systems.

5.4 Licensee shall use its best efforts to prevent any unauthorized digital transmissions and reproductions of Musical Works by operators and users of the Service and/or in any facility, on any device (including Covered Devices), or by any person under the supervision and/or control of Licensee.

**6. Royalty and Security Compliance**

6.1 Notwithstanding, without limiting and in addition to the general right of HFA and/or any Participating Publisher-Principal pursuant to industry custom and practice to examine the books and records of Licensee in connection with Licensee's use of Musical Works, HFA shall be entitled, upon thirty (30) days' notice to Licensee, to conduct an examination of the books, records, operations and Security Systems of Licensee ("Royalty and Security Examination") to determine whether Licensee is in compliance with its reporting, royalty and security obligations under this Agreement. Absent a good-faith basis to believe that Licensee is not in compliance with such obligations, HFA shall not seek to initiate a Royalty and Security Examination more than once every twelve (12) months or more than six (6) years following the termination of this Agreement.

6.2 During the course of a Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall, within three (3) business days (a) provide access to any information that may be called for by such request, including without limitation any (i) books, records, files, logs, reports, compilations, usage data and other documentation, whether in paper or electronic form, that were or could be used or required to generate or verify Licensee's Statements and/or that reflect or summarize Licensees' Statements; (ii) financial information, including books, records, ledgers, reports, and other documentation, reflecting cash receipts and general revenue accounts to the extent such information relates directly or indirectly to the activities licensed under this Agreement; and (iii) files, logs, reports, compilations, testing and monitoring data and other documentation related to and/or reflecting the operation and integrity of Licensee's Security Systems (such information,



along with the information described in the items (a)(i) and (a)(ii) of this Subsection 6.2, collectively referred to as "Documentation"); and (b) through the assistance of personnel who are familiar with the technical and operational aspects of Licensee's computer, hardware, software, Security Systems (collectively, "Operational Systems") who are to be made available by Licensee, provide real-time and/or historical access to such Operational Systems, as requested, sufficient to permit HFA or its examiner(s) to conduct meaningful tests and analysis to verify that (i) the Operational Systems are properly and accurately tracking and reporting the use of the Licensed Works, and royalties payable therefor, as contemplated by the terms of this Agreement; and (ii) the Operational Systems are in compliance with the security requirements set forth in Section 5 of this Agreement. Licensee shall provide the information, systems access and personnel required by this Subsection 6.2 free of charge and, unless otherwise agreed by HFA or its examiner(s), at Licensee's place of business.

- 6.3 During the course of and/or following completion of the Royalty and Security Examination, upon request by HFA or an examiner acting on its behalf, Licensee shall make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of such examination.
- 6.4 Licensee shall maintain any and all Documentation that reasonably might be expected to be relevant to HFA's conduct of a Royalty and Security Examination for a period of at least six (6) years following the expiration or termination of this Agreement, unless there is a Royalty and Security Examination in progress or not fully resolved as of the expiration of such period, in which case the Documentation shall be maintained until the Royalty and Security Examination is fully resolved to the satisfaction of HFA.
- 6.5 If a royalty examination reveals a nonpayment or underpayment of royalties due to HFA, the amounts determined to be owing shall be subject to interest payable at the rate of prime plus two percent (2%) calculated from the date the royalties were due to be paid under the applicable reporting period to the date of ultimate payment to HFA.

## **7. Termination/Default**

- 7.1 All license authority pursuant to Licenses issued hereunder shall terminate upon the expiration or termination of this Agreement (unless such Licenses are renewed pursuant to a renewal of this Agreement as contemplated under Section 3, in which case the terms of renewal shall apply as appropriate), and any further transmission and/or reproduction of any Licensed Work after the expiration of this Agreement shall be prohibited and actionable as an act of infringement under, and fully subject to the remedies provided by, the Copyright Act. Notwithstanding the foregoing, provided that the Agreement

has not been terminated due to Licensee's breach or default, any Server Fixations existing on Servers and/or Ringtone Deliveries existing on Covered Devices as of the expiration of the Agreement may remain on such Servers and Covered Devices; provided, however, that such existing Server Fixations (in addition to the Ringtone Deliveries) may not be further reproduced or distributed after the expiration of the Agreement.

- 7.2 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, Licensee understands and agrees that: (a) in the event Licensee fails to account to HFA and pay royalties provided for in Section 2, HFA may provide written notice to Licensee in the same manner as provided in Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the transmission and/or reproduction or both, of any Licensed Work for which royalties have not been fully paid actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 the Copyright Act; (b) in the event Licensee is in material breach or default of any of its obligations under this Agreement, HFA may provide written notice to Licensee in the same manner as provided by Section 115(c)(6) of the Copyright Act that, unless the default is fully remedied within thirty (30) days from the date of the notice, this Agreement and any Licenses issued hereunder will be automatically terminated, and that such termination will render the further transmission and/or reproduction, or both, of any Licensed Work actionable as an act of infringement under Section 501 of the Copyright Act, and fully subject to the remedies provided by Sections 502 through 506 and 509 of the Copyright Act. Licensee further understands and agrees that in the case of infringement, irreparable harm may be presumed, and HFA and/or any affected Publisher-Principal(s) shall be entitled as appropriate to injunctive relief, in addition to any other remedy that may be available at law or in equity and/or under this Agreement. For the avoidance of doubt, and without limitation, Licensee's breach of any of the obligations imposed by Sections 2, 5 and 6 of this Agreement shall be considered a material breach of, and default under, this Agreement.
- 7.3 To the extent permitted by applicable law, and without limitation, the occurrence of any of the following events shall also be considered a material breach of and default under this Agreement: (a) Licensee's dissolution and/or the liquidation of all of Licensee's assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Licensee; (c) the appointment of a receiver or trustee for all or a portion of Licensee's assets; (d) Licensee's assignment of assets for the benefit of creditors; and (e) Licensee's insolvency. Upon the occurrence of any of the events described in items (a) through (e) of this Subsection 7.3,

notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, this Agreement and all license authority pursuant to any Licenses granted hereunder shall terminate automatically without the requirement of any further action on the part of HFA or the Participating Publisher-Principals.

7.4 Notwithstanding, without limiting and in addition to any other remedy that may be available at law or in equity and/or under this Agreement, including without limitation the remedies set forth in Subsection 7.2, the breach of any of the provisions set forth in Section 5 shall entitle HFA and/or any relevant Publisher-Principal to specific performance of such provision and/or to terminate, effective immediately upon the giving of notice, the license authority pursuant to any License granted hereunder.

7.5 Notwithstanding the expiration or termination of this Agreement, Sections 2, 4, 5 and 6 and Subsections 7.1, 7.4, 8.2, 8.3, 8.4, 8.5, 8.6 and 8.8 shall to the extent applicable survive and continue to bind the parties and their legal representatives and successors.

#### 8. Miscellaneous

8.1. Administrative Fee. In addition to the royalties payable hereunder, within five (5) business days following execution of this Agreement, Licensee shall pay to HFA an administrative fee of **Redacted** in consideration of HFA's administrative expenses in connection with the publisher opt-in and licensing processes contemplated hereunder.

8.2. Notices. All notices hereunder shall be in writing and shall be deemed effective (a) if provided by hand delivery, upon delivery; (b) if provided by overnight courier, one (1) business day following the date sent; and (c) if provided by registered or certified mail, return receipt requested, five (5) business days following the date mailed. Notices shall be sent to the following addresses:

If to HFA:

To the address set forth above. Attn: General Counsel. Fax: 212-922-3299.

If to Licensee:

To the address set forth above. Attn: Attn: **Redacted**

8.3. Publicity. Neither party shall issue any press release or other publicity document concerning this Agreement without the prior written consent of the other party.

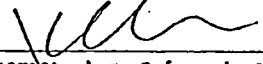
- 8.4 Assignment. This Agreement may not be assigned.
- 8.5 Entire Agreement; Amendment. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, supersedes all prior and contemporaneous agreements and understandings of the parties with respect to the subject matter hereof, and may not be altered or amended except in a written instrument executed by both parties.
- 8.6 Governing Law; Jurisdiction. This Agreement shall be governed by, and construed in accordance with, federal law and/or the laws of the State of New York (without giving effect to conflicts of law principles thereof), as may be applicable. With respect to any action or proceeding arising out of this Agreement, the parties (a) agree that the sole and exclusive venue for such action or proceeding shall be in a court of appropriate jurisdiction located in New York County, New York; (2) agree to the appropriateness of, and waive any objection concerning, the propriety and/or convenience of, proceeding in such venue; and (3) consent to the personal jurisdiction of such court.
- 8.7 Severability; Waiver. If a court should determine that any part of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Performance of any obligation required of a party hereunder may be waived only by a written waiver signed by a duly authorized officer of the other party, which waiver shall be effective only with respect to the specific obligation described therein.
- 8.8 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.
- 8.9 Assistance of Counsel. Each party hereto acknowledges that it has been represented by its own independent counsel, who has reviewed this Agreement and discussed the terms herein with his or her respective client prior to execution.

8.10 Counterparts: This Agreement may be executed in multiple counterparts and delivery of an executed counterpart may be made by facsimile, each such counterpart to be considered and accepted as an original, and all such counterparts together to constitute a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date:

Redacted

THE HARRY FOX AGENCY, INC.

By:   
Print name: J.C. Chaderwode  
Title: SUP & General Counsel

**EXHIBIT CO 0045**



The Harry Fox Agency, Inc.

711 Third Avenue  
New York, NY 10017

212-922-3270  
212-338-0350 FAX

gchurgin@harryfox.com  
www.harryfox.com

**Gary L. Churgin**  
President and CEO

May 19, 2003

REDACTED

and

President and CEO

REDACTED

Re: REDACTED /HFA Agreement

Dear REDACTED

Upon signature of the three parties set forth below, this side letter ("Side Letter") will confirm the following understandings between REDACTED on the one hand, and the Harry Fox Agency, Inc. ("HFA"), on the other, in connection with that certain Agreement Concerning the Licensing of Certain Internet Music Subscription Services dated as of May 19, 2003 between REDACTED and The Harry Fox Agency, Inc. ("HFA") (the REDACTED

1. REDACTED each warrant and represent to HFA that the transaction pursuant to which a majority ownership interest in REDACTED has been/will be acquired by a third party on or about May 19, 2003 resulting in the creation of REDACTED (the "Transaction") is/was entirely in the nature of a stock or other type of equity-based transaction rather than an asset purchase or other type of asset-based transaction. REDACTED and REDACTED each further

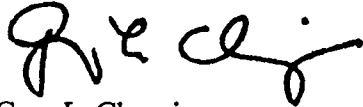
warrant and represent to HFA that they have been provided with legal advice that the nature of the Transaction is such that it does not implicate or contemplate an assignment of any rights or licenses REDACTED, acquired or was entitled to acquire pursuant to its participation in that certain Agreement dated as of October 5, 2001 between National Music Publishers' Association, Inc. and HFA, on the one hand, and The Recording Industry Association of America, Inc. on the other (the "RIAA Agreement").

2. REDACTED warrants, represents and covenants to HFA that upon execution of the REDACTED shall assume and be responsible to HFA and its publisher principals for all of the past, present and future obligations of REDACTED to HFA and its publisher principals in connection with REDACTED participation in the RIAA Agreement and any and all licenses issued to REDACTED by HFA under the RIAA Agreement or otherwise as digital phonorecord delivery ("DPD") licenses, including, without limitation, any and all outstanding reporting and payment obligations, and any and all obligations concerning the preservation of usage and financial data.
3. In consideration of, and in reliance upon, the warranties, representations and covenants set forth in this Side Letter, HFA acknowledges and agrees that notwithstanding that REDACTED will no longer be participating in the RIAA Agreement as of the effective date of the Transaction, all licenses previously obtained by REDACTED from HFA under the RIAA Agreement or otherwise as DPD licenses shall remain in effect to the benefit of REDACTED
4. REDACTED and REDACTED agree to indemnify, defend and hold harmless HFA and its directors, officers, employees, parents, subsidiaries, affiliates, principals, agents and representatives with respect to any claim, cause of action or liability (including reasonable attorneys' fees and expenses) including, without limitation, HFA's alleged infringement or violation of any right of any party, arising out of or relating to HFA's reliance on and/or a breach of any of the warranties, representations or covenants set forth herein.
5. Within five business days following execution of the REDACTED Agreement, REDACTED shall pay to HFA a one-time administrative fee of REDACTED in consideration of the administrative burdens associated with HFA's licensing



responsibilities under the REDACTED Agreement and the costs associated with preparation and mailing of notices to HFA's publisher principals concerning the REDACTED Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "G. L. Churgin", with a stylized flourish at the end.

Gary L. Churgin

REDACTED

## **Agreement Concerning the Licensing of Certain Internet Music Subscription Services**

This agreement (the "Agreement"), dated as of May 19, 2003 ("Effective Date"), is made by and between REDACTED a Delaware corporation ("Licensee") and The Harry Fox Agency, Inc. ("HFA"), (the "Parties").

WHEREAS, Licensee desires to offer to consumers certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works available to consumers by licensing such services;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and Licensee may prefer to make business decisions concerning the launch of Covered Services (as defined below) with greater assurance concerning the legal status of such services;

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to Licensee and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of unresolved legal issues and to facilitate the expeditious launch of digital music services, the Parties have reached this Agreement (which reflects HFA's standard terms with respect to the concepts covered herein) with respect to terms pursuant to which Licensee may obtain licenses to make On-Demand Streams and Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(c)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Covered Services. When Licensee seeks to use a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that are the subject matter of this Agreement in connection with the operation of its Covered Services, it may obtain through HFA on behalf of such HFA publisher-principal a mechanical license ("License") to make On-Demand Streams and Limited Downloads of the work through Covered Services, through to the end user, including by making server and related reproductions of the work used in the operation of Covered Services.

1.1. "Covered Service" means a service that offers (but the offerings of which are not necessarily limited to) On-Demand Streams and/or Limited Downloads of sound recordings of musical works from servers located within the United States, where the basic charge to users for the service is a recurring subscription fee (in contrast to the basic charge being a per-download, per-play or per-song fee), including any use of such a service on a limited basis without charge to users in order to promote the subscription service.

1.2. "On-Demand Stream" means an on-demand, real-time digital transmission of a sound recording of a single musical work to allow a user to listen to a particular sound recording chosen by the user at a time chosen by the user, using streaming technology, which may include but is not limited to Real Audio or Windows Media Audio, that is configured by the provider of the Covered Service in a manner designed so that such transmission will not result in a substantially complete reproduction of a sound recording being made on a local storage device (e.g., the hard drive of the user's computer or a portable device) so that such reproduction is available for listening other than at substantially the time of the transmission.

1.3. "Limited Download" means a digital transmission of a time-limited or other use-limited download of a sound recording of a single musical work to a local storage device (e.g., the hard drive of the user's computer or a portable device), using technology designed to cause the downloaded file to be available for listening only either (1) during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) not to extend more than thirty (30) days beyond the expiration of the user's subscription, or (2) for a limited number of times not to exceed twelve (12) times after the expiration of the user's subscription.

1.4. Any HFA publisher-principal that grants a License and/or accepts a portion of an Advance Payment hereunder is referred to herein as a "Participating HFA Publisher." The term "Participating HFA Publisher" is limited to such entities and their majority-owned subsidiaries.

## 2. Covered Deliveries.

2.1. A License with respect to a musical work includes all reproduction, distribution and DPD rights necessary for Covered Services to make On-Demand Streams and Limited Downloads of that work, from the making of server reproductions to the transmission and local storage of the On-Demand Streams or Limited Downloads. A License does not extend to other transmissions made by a Covered Service or to activities not encompassed by a mechanical license, including, without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to synchronize musical works with visual images resulting in audiovisual works, or karaoke rights, all of which rights are specifically reserved. The Parties agree that server reproductions made under a License to transmit On-Demand Streams or Limited Downloads may be used to make transmissions other than On-Demand Streams and Limited Downloads; provided that the foregoing is without prejudice to any applicable requirement, if any, that Licensee also obtain a license for such other transmissions made using such server reproductions. It is understood that this Agreement does not address or extend to any performance rights that may be implicated by the making of On-Demand Streams or Limited Downloads through Covered Services.

2.2. A License includes the right to make, and there shall be no separate payment or accounting for, On-Demand Streams of Promotional Excerpts (as defined below) of sound recordings of musical works licensed hereunder used for promotional purposes, provided that the relevant copyright owner or copyright owners of such sound recordings has duly authorized the relevant copyright owner or copyright owners of such musical work (or an organization of copyright owners designated by such copyright owners as their common agent) to make On-Demand Streams of Promotional Excerpts of that sound recording for the purpose of promoting that musical work without payment of any royalty. "Promotional Excerpt" is defined as a stream consisting of no more than thirty (30) seconds of playing time of the sound recording of a musical work, or in the case of sound recordings with a playing time of more than five minutes, a stream that is of no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of the sound recording of the musical work.

### 3. Licensing Process.

3.1. Commencing on the Effective Date, Licensee may submit License requests in electronic form, either individually or batched, and either for On-Demand Streams and/or Limited Downloads alone or in combination with other configurations, substantially in accordance with Exhibit A. In addition, Licensee may submit License requests by other means generally accepted by HFA, including but not limited to HFA's new web-based licensing system (when it becomes available), and HFA's standard paper form (but only using paper forms for complex License requests (e.g., requests involving medleys or samples), in limited numbers during times when electronic licensing capabilities are unavailable, or at other times in numbers that are generally consistent with Licensee's past use, if any, of paper forms and in any case in numbers that do not exceed what HFA can reasonably be expected to process under the circumstances). HFA may modify its license request and license forms from time to time, provided that it gives reasonable notice thereof to Licensee and such modifications do not unreasonably affect the ability of Licensee to submit license requests and obtain licenses. License forms may be issued electronically or in paper form, but when Licensee submits a License request in electronic form in accordance with this Section 3.1, HFA shall, promptly after processing the License request, return to Licensee an electronic file substantially in accordance with Exhibit A, with (1) the addition of that information indicated in Exhibit A as being "output" fields, (2) the addition of information, other than individual publisher share information, to complete any blank optional fields in the request, to the extent that such information is available in HFA's databases and is matched to the request in the License issuance process, (3) the substitution of information concerning HFA publisher-principal names where such information in HFA's databases is different from that in the request, and (4) the aggregated share of Participating HFA Publishers. If Licensee submits a License request in accordance with this Section 3.1 but the request contains insufficient information for HFA to find a match for the relevant work in its databases, HFA will work with Licensee to provide the information necessary to enable a License to be issued, and if Licensee resubmits such request with the necessary information and the License can be issued, the provisions of Section 3.4 shall apply from the date of the original request. The Parties acknowledge the importance to HFA and music publishers of having License requests submitted promptly, and the importance to Licensee of having License forms issued promptly. The Parties shall cooperate in good faith to promote each of those goals.

3.2. The authority of HFA to license any individual musical work on behalf of its publisher principals is subject to the approval of the relevant publisher-principal. HFA shall not require its publisher principals to opt in to this Agreement either before or after commencing to issue Licenses to the extent it is authorized to do so; provided, however, that HFA may establish an opt out period before commencing to issue Licenses on behalf of certain publisher principals (whose identities HFA will disclose to Licensee simultaneously with the execution of this Agreement) to allow such publisher principals to decide whether to participate in the Agreement, which period will end no later than six weeks following the Effective Date (the "Opt Out Period"). Notwithstanding the foregoing, HFA will use its good faith efforts to solicit responses from such certain publisher principals in a shorter time frame. If an HFA publisher-principal at any time requests that HFA not issue Licenses on its behalf (either with respect to particular musical works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a License issued prior to such request (including, without limitation, under any prior agreement under which Licensee may have obtained Licenses). Upon the expiration of the Opt Out Period, HFA shall notify Licensee of any HFA publisher principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement (as well as any HFA publisher principals that have previously provided notice to HFA that they are opting out of all agreements of this nature), and thereafter will provide a list of any such publisher principals upon Licensee's written request (such requests not to be made more than once per calendar quarter).

3.3. HFA shall issue mechanical licenses for DPD configurations (including but not limited to Licenses under this Agreement) with respect to a musical work in its entirety if one or more of its publisher-principals owns or controls a partial interest in such musical work, even if other co-owners of such musical work are not HFA publisher-principals, except that, pursuant to Section 3.2, if all the HFA publisher-principals that own or control a partial interest in such work request that HFA not issue mechanical licenses on their behalf, HFA will not issue such licenses. In the case of a mechanical license issued as described in this Section 3.3, Licensee shall pay directly to each co-owner that is not an HFA publisher-principal (or such co-owner's authorized payee) such co-owner's share of the applicable royalty payments under Section 6.1.

3.4. License forms issued by HFA pursuant to this Agreement shall be retroactive to the date of the License request made by Licensee on or after the Effective Date in accordance with Section 3.1. To the extent that Licensee makes On-Demand Streams and Limited Downloads of musical works pending the processing by HFA of license forms in response to proper License requests submitted on or after the Effective Date in accordance with Section 3.1, HFA shall not directly or indirectly file, encourage, aid, support, finance, contribute to, promote, or participate in any claim, suit, action or proceeding asserting that such activities are infringing.

3.5. Subject to Section 3.3, HFA shall also accept License requests to make On-Demand Streams and Limited Downloads through Covered Services of musical works as to which no HFA publisher-principal has any ownership interest or control, in whole or in part, and for which a License is not otherwise available under this Agreement. In such a case, HFA shall use commercially reasonable efforts to secure the requested Licenses from the relevant non-HFA publisher-principals on the same terms as apply to HFA publisher-principals under this Agreement. (Non-HFA publisher-principals who grant Licenses through this arrangement shall be referred to as "Participating Independent Publishers".) In addition to any commission charged to the Participating Independent Publisher, HFA may charge Licensee a one-time administrative

fee of ninety-five dollars (\$95) for each publisher that agrees to become a Participating Independent Publisher (it being understood that no such administrative fee shall be payable for any subsequent Licenses issued on behalf of that Participating Independent Publisher to Licensee), unless the Participating Independent Publisher also authorizes HFA to grant mechanical licenses other than Licenses under this Agreement, in which case no such fee shall apply. The Advance Payment described in Article 4 may be applied to such administrative fee when payable by Licensee, and HFA shall provide to Licensee or an independent accounting firm designated by Licensee sufficient information concerning liability for such administrative fee to allow reconciliation of the Advance Payments as described in Section 4.4. When HFA arranges Licenses from Participating Independent Publishers pursuant to this Section 3.5, HFA shall collect and distribute mechanical royalties to such Participating Independent Publisher (or other authorized payees) unless Licensee requests to make such payments directly.

3.6. HFA and Licensee shall enter into a Data Access and Use Agreement, in the form attached hereto as Exhibit B.

3.7. Nothing in this Agreement, including but not limited to the availability of Licenses or the procedures for obtaining the same, shall preclude Licensee from at any time serving or filing a notice of intention to obtain a compulsory license in accordance with applicable law or, other than in Article 8, imply that any notice of intention so served or filed is valid or invalid. Nothing in this Agreement shall preclude Licensee from seeking, or HFA or any of its publisher-principals from granting, direct licenses to Licensee, including without limitation for use of musical works on the Covered Services, on whatever terms might be agreed upon between the relevant parties.

#### 4. Advance Payment.

4.1. Within five business days following the end of the Opt Out Period, Licensee shall pay to HFA its standard established non-refundable advance royalty payment ("Advance Payment") for agreements of this nature, equal to REDACTED. Notwithstanding the foregoing, to the extent that any publisher principal ranking among the top ten (10) HFA publisher principals based upon total royalties distributed by HFA to all HFA publisher principals during the calendar years 2001 and 2002 (each, a "Major Publisher Principal") opts out of this Agreement within the Opt Out Period pursuant to the provisions of Section 3.2 hereof ("Major Opt Out Publisher Principal"), such advance will be reduced by an amount equal to REDACTED (and, to the extent that such advance has previously been paid by Licensee, HFA will refund such amount to Licensee). If, by the second anniversary of the Effective Date, there has then been no final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, then, subject to Section 4.2, until such a determination, Licensee shall each month pay to HFA its standard supplementary Advance Payment rate of REDACTED (such amount to be proportionately reduced to the extent that there are any Major Opt Out Publisher Principals).

4.2. Effective at the second anniversary of the Effective Date or any time thereafter, Licensee may terminate this Agreement upon thirty (30) days advance written notice to HFA. In the event Licensee does so, all Licenses previously issued under this Agreement

shall terminate at the same time as this Agreement, without prejudice to the right of Licensee thereafter to obtain new licenses under 17 U.S.C. § 115. In the case of termination by Licensee (a) payments shall be due in accordance with Section 6.1 for activities under this Agreement prior to the termination of the relevant Licenses, (b) Advance Payments may be applied against such payments in accordance with Section 4.4, and (c) to the extent remaining, Advance Payments also may be applied to royalties due under new licenses for On-Demand Streams and Limited Downloads made through Covered Services, which licenses are issued by HFA at least one year after the relevant date of termination of Licensee's Licenses. In addition to the foregoing, if there is a decision of the U.S. Copyright Office or a court, or any new legislation, inconsistent with Section 8.1, with the result that mechanical royalties are not required to be paid for some or all On-Demand Streams and/or Limited Downloads made through Covered Services, then the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be reduced to take into account such decision or legislation, based on actual usage under this Agreement to date, with the exact amount of such reduction to be agreed upon by the Parties promptly after such decision or legislation; provided that if any such decision is appealed and finally reversed on appeal, the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be restored, and Licensee shall promptly pay to HFA the total amount by which the supplementary Advance Payment was reduced in the interim.

4.3. HFA shall deposit Advance Payments into an interest-bearing bank account (with such interest being treated as part of the Advance Payment). HFA shall be free to distribute the initial and supplementary Advance Payments to HFA publisher-principals in accordance with a reasonable and nondiscriminatory methodology based on market share, actual usage or a per musical work payment (which methodology HFA shall provide to Licensee), as well as to any Participating Independent Publishers pursuant to Section 3.5. Except insofar as it is recouped pursuant to Sections 4.4 and/or 4.5, the Advance Payment shall be nonrefundable.

4.4. Upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, the total amount of Advance Payments (including interest) shall be applied against undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers for On-Demand Streams and Limited Downloads made through Covered Services pursuant to Licenses issued under this Agreement. Such Advance Payments for these uses shall be applied to the account of Licensee. If the Advance Payments are not fully recouped at such time, any remainder of the Advance Payments thereafter shall be applied against all undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Licensee under mechanical licenses issued by HFA for On-Demand Streams and Limited Downloads made through Covered Services (including but not limited to Licenses under this Agreement), until such amount is fully recouped.

4.5. At the request of HFA, with Licensee's written consent, which consent shall not be withheld unreasonably, Advance Payments may be applied to other undisputed amounts (e.g., other mechanical royalties) owed by Licensee to HFA on behalf of its publisher-principals.

5. Royalty. The royalty rate payable under a License shall be determined through negotiation and/or a CARP proceeding. The applicable rate will be structured as determined through negotiation or by the CARP, and may comprise separate royalty rate components for distinct uses of the musical work authorized by the License. The Parties may meet to negotiate royalty

rates in good faith. HFA reserves its right to seek interest as a part of such royalty rate determination. Licensee reserves its right to seek to have such royalty rate determination reflect any payments under foreign copyrights in the case where On-Demand Streams or Limited Downloads are transmitted to users outside of the United States. Whether royalty rates are determined by negotiation or a CARP, and regardless of how royalty rate categories may be denominated, the Parties shall seek a determination of royalty rates such that it is clear which royalty rates are applicable to each of On-Demand Streams and Limited Downloads.

## 6. Accounting and Payment.

6.1. Beginning with the issuance of a License, Licensee will be required to account to HFA on a quarterly basis for activity under such License, 45 days after the close of each quarter, providing information comparable to that presently provided by major record labels for physical products, and specifically including the number of On-Demand Streams and Limited Downloads of each work made during such quarter. Without limitation, quarterly reports shall include a breakdown of On-Demand Streams and Limited Downloads made by Covered Services under Licenses in the applicable quarter, by musical work and delivery method code (indicating On Demand-Streams and/or Limited Downloads), and including ISRC number if available, catalog number if available and HFA license number if available (in the same manner indicated by Licensee in its License request), and shall identify the specific Covered Services in which such On-Demand Streams and Limited Downloads were made. Licensee shall preserve all usage and financial data that reasonably should be expected to be relevant, upon the determination of royalty rates, to the calculation of royalties hereunder and use commercially reasonable efforts to do so for each Covered Service it operates hereunder. Subject to Article 4 and Section 3.3, upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, Licensee shall make the applicable payment for all previous quarters then completed, from the launch of the applicable Covered Services to date, within 45 days, to be accompanied by a cumulative statement setting forth and aggregating the information provided in the previous quarterly reports supplied under this Agreement. Thereafter, on a quarterly basis, 45 days after the close of each quarter, Licensee shall account to HFA for activities and/or revenues realized on such activities during such quarter as determined through negotiation and/or by regulation, providing such information as is required by regulation, a CARP, and/or a negotiated rate agreement, and, subject to Article 4 and Section 3.3, pay royalties at the applicable rate. Notwithstanding the foregoing, HFA reserves its right to seek more frequent access, including without limitation real-time access, to usage information.

6.2. At the request of HFA, Licensee shall accompany its quarterly reports with any available data in addition to that described in Section 6.1 concerning the numbers of On-Demand Streams and Limited Downloads made through Covered Services operated by Licensee (but not any personally identifying information), which data is regularly gathered or compiled by Licensee or provided to Licensee by its licensees with the legal right to disclose such data to HFA hereunder; provided that Licensee may provide any such data to HFA in whatever form it is available to Licensee in the ordinary course of its business and subject to any applicable confidentiality and other contractual use restrictions; and provided further that, before making any such request, HFA shall review with Licensee the types of such data Licensee has and can disclose to HFA, and the form in which such data is available, and HFA shall not request, and Licensee shall not be required to provide, data that (given the volume and form of



such data, the degree to which such data is reflected in quarterly reports, the data processing capabilities of HFA and Licensee, HFA's intentions to use such information, and other relevant factors) would not be commercially reasonable to provide. In addition, to the extent such information is available to Licensee and can be disclosed to HFA hereunder, at the request of HFA, Licensee shall accompany its quarterly reports with the total number of subscribers to and total number of subscriber months for each Covered Service operated by Licensee during the reporting period; provided that any such information relating to a Covered Service operated by Licensee shall be subject to an appropriate confidentiality restriction, and any such information provided to Licensee by a third party shall be subject to any applicable confidentiality and other contractual use restrictions.

7. Term. The term of this Agreement shall commence on the Effective Date and, subject to Sections 4.2 and 8.5, continue until the final non-appealable determination of royalty rates for each of On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding. New Licenses shall continue to be issued pursuant to this Agreement for the duration of such term. Thereafter, Licensee may request, and HFA shall issue, mechanical licenses covering On-Demand Streams and Limited Downloads at the applicable royalty rates in accordance with its customary practices for the issuance of licenses where there is an applicable statutory rate, which the Parties currently understand to include the means of application described in Section 3.1. Notwithstanding the foregoing, Licenses once issued under this arrangement shall remain in effect unless terminated for default in respect to payment (once royalty rates are determined) or accounting (either before or after royalty rates are determined) pursuant to 17 U.S.C. § 115(c)(6) (or other applicable provision of law, if any), it being understood that a License may not be terminated for such a default where the default is remedied as provided in 17 U.S.C. § 115(c)(6). In addition, the provisions of Sections 4.2, 4.4 and 4.5, and of Articles 6 and 7, shall survive the expiration or termination of this Agreement or any License under this Agreement.

8. Legal Framework for Agreement.

8.1. Subject to the other provisions of this Article 8, in order to avoid litigation and to provide assurance to Licensee in connection with the launch of its digital music services and enable HFA's issuance of license forms for Covered Services hereunder:

(a) The Parties agree that under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act. The Parties further agree that under current law the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of a DPD, and thus does not require a mechanical license. The foregoing does not express or imply any agreement that, and shall not be used to support any argument that, the process of making On-Demand Streams other than through Covered Services, or the process of making streams that would not qualify for a statutory license under Section 114(d)(2) of the Copyright Act (including, without limitation, because such streams are

part of an "interactive service" (as that term is defined in Section 114(j)(7)) or exceed the "sound recording performance complement" (as that term is defined in Section 114(j)(13)) does or does not involve the making and distribution of a DPD, and the Parties expressly reserve all their rights with respect to that issue.

(b) The Parties agree that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (*i.e.*, inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

(c) The Parties agree that under current law a compulsory license to make On-Demand Streams and Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the On-Demand Streams and Limited Downloads) is available under Section 115 of the Copyright Act.

8.2. Subject to Sections 8.3 and 8.5, for the term of this Agreement, no party to this Agreement and no Participating HFA Publisher shall take a position contrary to or inconsistent with Section 8.1, or lend support or resources, financial or otherwise, to any other person or entity taking a contrary or inconsistent position, before the Copyright Office, a CARP, a court or any other government office or tribunal. Thereafter, no party to this Agreement and no Participating HFA Publisher shall commence or lend support to any action in court to challenge the validity of the rates determined pursuant to Article 5 on the ground that On-Demand Streams and Limited Downloads do not involve the making or distribution of DPDs. It is understood that, for purposes of this Section 8.2, Licensee or Participating HFA Publishers shall not be deemed to lend financial support or resources to affiliated entities merely through intra-enterprise financial arrangements in the ordinary course of business or merely by paying membership dues or fees that a trade association ordinarily requires of its members or by merely sitting on the board of directors of a trade association.

8.3. Notwithstanding Sections 8.1 and 8.2, the Parties and Participating HFA Publishers may at any time (1) raise and litigate (including, without limitation, before a CARP) the economic value of, and the appropriate royalty rates to be applied to, On-Demand Streams and Limited Downloads; (2) take or support any position they choose with respect to sound recordings (as distinguished from any musical works embodied therein) and the rights therein, including, without limitation, rights under Sections 106 and 114 of the Copyright Act, and (3) make or lend support to any arguments they choose to prosecute, or defend or counterclaim against, an infringement claim relating to activities before the Effective Date. Notwithstanding Sections 8.1 and 8.2, Licensee may at any time make or lend support to any arguments they choose to defend or counterclaim against an infringement claim relating to activities on or after the Effective Date, in the event that a License with respect to the relevant works is not available hereunder (it being understood that, subject to Section 8.4, HFA and Participating HFA Publishers may participate in the litigation of any such claim, so long as their doing so is consistent with Sections 8.1 and 8.2). The Parties agree that they will act in good faith not to induce, promote or encourage the litigation of an infringement claim relating to activities as described in the immediately preceding sentence.

8.4. To the extent that an action being litigated by Licensee involves the question of the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c) for a musical work for which a License is not available under this Agreement, HFA shall not participate in or lend support to such action. The Parties agree that they will act in good faith not to induce, promote or encourage litigation concerning the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c). For purposes of this Article 8, HFA shall include its parent National Music Publishers' Association, Inc.

8.5. To the extent that a final, non-appealable decision of the Copyright Office or a court, or any new legislation, is inconsistent with Section 8.1, this Agreement shall be inapplicable to the extent of the inconsistency as of the date thereof, but subject to Article 4, Licensee shall not be entitled to a refund of any monies paid prior to such date.

8.6. Nothing in this Article 8 shall be used by, or be enforceable by, a third party not a Party to this Agreement, in any manner or in any context, including without limitation in any legal proceeding. This Agreement does not give rise to any third party beneficiary rights in any party other than Participating HFA Publishers. The agreements set forth in this Article 8 and the course of dealing hereunder shall be inadmissible, and shall not be used to support any argument of law, in any litigation or arbitration relating to (1) activities before the Effective Date or (2) activities other than making and distributing On Demand Streams and Limited Downloads through Covered Services, except making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act.

## 9. Security.

9.1. Licensee shall incorporate, as part of the distribution of sound recordings embodying licensed works to users pursuant to this Agreement, a security technology, including, but not limited to, use of a digital rights management technology, for existing and prospective users that is designed to permit transmission to an end user in a secure manner (e.g., so as to prevent illicit copying). In the event of a breach of such security technology, licensee shall use its reasonable best efforts to devise a solution to such security breach in order to continue the operation of the Covered Services and shall keep HFA reasonably informed as to the status thereof.

9.2. To the extent the Covered Services use third-party technology in order to satisfy the requirements of Section 9.1, Licensee shall use its commercially reasonable efforts to maintain and upgrade such technology by diligently monitoring any third-party announcement made available to Licensee of bug-fixes, security holes and functionality improvements, obtaining such upgrades, and installing and distributing such upgrades as reasonably necessary to maintain the integrity of the Covered Services.

9.5. Licensee shall use its reasonable best efforts to prevent the creation of any unauthorized copies of any licensed works in any facilities in its control in any form (including but not limited to, copies created by employees or contractors outside the immediate scope of their employment), and shall use its commercially reasonable efforts to prevent the creation of such unauthorized copies by any users. If Licensee learns of any material circumvention of the technology used to satisfy the requirements of Section 9.1 above or of any material incident of

unauthorized manufacture, advertising, distribution, lease or sale of the licensed works relating to a Covered Service (any of the foregoing an "Unauthorized Use"), Licensee shall promptly provide HFA with written notification of such Unauthorized Use and take all reasonable steps, and reasonably cooperate with HFA, to prevent such Unauthorized Use. Without limiting any other rights and remedies of HFA and its Licensors, if HFA learns, and provides Licensee with reasonably credible evidence, that there are widespread, significant and substantial Unauthorized Uses, upon forty-five (45) days' notice by HFA, Licensee must, unless it secures its technology against such Unauthorized Uses to the satisfaction of HFA within the forty-five (45) day period, suspend all On-Demand Streams or Limited Downloads of the licensed works under this Agreement pending Licensee's securing its technology against such Unauthorized Uses to the reasonable satisfaction of HFA. Licensee will, on a quarterly basis, inform HFA of all known material breaches or attempted breaches of its security measures and Licensee's response to each of those breaches or attempted breaches.

10. Electronic Reporting. The Parties agree to work together in good faith to implement means whereby accounting information relating to Licenses will be provided to HFA in electronic, machine-readable form.

11. Publicity. Licensee and HFA may issue a mutually agreed joint press release announcing this arrangement within a reasonable time period following the Effective Date. HFA will not make any public announcement regarding this Agreement without Licensee's consent prior to the issuance of such joint press release. In HFA's communications to its members concerning this Agreement, it shall recommend that HFA members and HFA publisher principals avail themselves of this Agreement.

12. Miscellaneous.

12.1. Assignment. This Agreement shall be binding upon and inure to the benefit of all of the parties and their respective permitted successors and permitted assigns. Any assignment or transfer by Licensee of any of its rights or licenses under this Agreement shall require the prior written consent of HFA.

12.2. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to conflicts of law principles thereof).

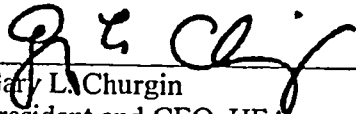
12.3. Amendment. This Agreement may be modified or amended only by a writing signed by each of the Parties.

12.4. Entire Agreement. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

12.5. Counterparts. This Agreement may be executed in counterparts, including by means of facsimile, each of which shall be deemed to be an original, but which taken together shall constitute one agreement.

12.6. Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

  
\_\_\_\_\_  
Gary L. Churgin  
President and CEO, HFA

REDACTED

EXHIBIT A  
UPDATE

EXHIBIT B

FORM OF DATA ACCESS AND USE AGREEMENT

[TO COME]

## Data Access and Use Agreement

This Agreement, dated as of May 12, 2003, between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and REDACTED a Delaware limited liability corporation having its principal place of business at REDACTED ("Licensee").

WHEREAS, HFA possesses databases containing data pertaining to certain copyrighted musical works (collectively, the "HFA Database");

WHEREAS, Licensee desires access to and permission to use portions of such data in order to provide certain data provisioning services;

WHEREAS, the parties to this Agreement desire to form a relationship whereby Licensee accesses a particular subset of the HFA Database in order to facilitate licensing arrangements with HFA;

NOW THEREFORE, in consideration of these premises and the mutual promises, covenants and agreements contained in this Agreement, HFA and Licensee agree as follows:

### SECTION 1: ADDITIONAL TERMS; DEFINITIONS

1.1 **Definitions.** As used in this Agreement, the following capitalized terms shall have the meanings given below:

"Affiliate" with respect to any person or entity, means and includes any person or entity controlling, controlled by or under common control with such person or entity.

"Confidential Information" means any and all information intended to remain confidential relating to each party's business and its databases, products, services, business strategies, designs, capabilities or business affairs, including, but not limited to, HFA Information, all data related to publisher-principals, concepts, methods, drawings, documents, proposals, specifications, data models, data integration tools and techniques, code, programs, as well as samples, specimens, copyright, patent and/or trademark applications or registrations, trade secrets, know-how, customers or prospective customers, customer lists, and any other proprietary information relating to each party's businesses, and the development, testing, manufacture, creating and/or licensing of each party's products and services.

"HFA Information" means the portion of the HFA Database that is provided to Licensee by HFA in accordance with the terms hereunder.



"Internet Music Licensing Agreement" means the Agreement Concerning the Licensing of Certain Internet Music Subscription Services, dated as of the date hereof, by and between HFA and Licensee.

"Territory" means the United States and its territories.

"Term" has the meaning given to it in Section 6.1.

## SECTION 2: LICENSE GRANT

2.1 Grant. Subject to and in accordance with the terms of this Agreement, HFA grants Licensee a royalty-free, non-exclusive, non-transferable right and license for the duration of the Term, within the Territory, without the right to sublicense, to access and use the HFA Information solely as necessary to facilitate and administrate licensing arrangements with HFA pursuant to the Internet Music Licensing Agreement. All rights not expressly granted under this Agreement are reserved by HFA.

### 2.2 Limitations.

(a) Licensee covenants that it shall not nor authorize any person or entity to use in any manner not expressly authorized hereunder, to relicense, resell, further distribute or disclose the HFA Information, or any part thereof, without HFA's express written permission.

(b) License covenants that it shall not systematically extract and/or copy, whether by bulk transfer or through individual data query and response, any elements of the HFA Information provided hereunder except if the sole purpose of such extraction and/or copying is to request or administer HFA licenses pursuant to the Internet Music Licensing Agreement.

(c) Licensee covenants that it shall not nor authorize any person or entity to use the HFA Information to engage in business activities in competition with HFA or for any purpose other than to request and administer licenses issued by HFA and Licensee shall not disclose the HFA Information to any third party except insofar as it is reasonably necessary to disclose noncompiled, individualized data relating to particular works for the purpose of requesting or administering licenses issued by HFA pursuant to the Internet Music Licensing Agreement.

(d) Licensee covenants that it shall not extract or copy any data from the HFA Information and/or incorporate such data (or extracted data) into its own or any third-party-owned database(s) except if the sole purpose of such extraction or incorporation is to request or administer HFA licenses pursuant to the Internet Music Licensing Agreement.

(e) Licensee covenants that it shall not, for any purpose, intermingle, whether by bulk transfer or through individual data query and response, the HFA Information with, or incorporate the HFA Information into, its own or any third-

party-owned database containing information other than the HFA Information except for the sole purpose of requesting or administering HFA licenses pursuant to the Internet Music Licensing Agreement.

### SECTION 3: INTELLECTUAL PROPERTY AND CONFIDENTIALITY

3.1 **Intellectual Property.** Licensee acknowledges and agrees that all right, title and interest in and to the HFA Information and the HFA Database is and shall remain with HFA. HFA acknowledges that all, right, title and interest in and to the information provided by Licensee shall remain with Licensee, subject to HFA's right to use the information for the purpose of administering licenses under the Internet Music Licensing Agreement. HFA acknowledges and agrees that all right, title and interest in and to Licensee's proprietary information is and shall remain with Licensee.

(a) Licensee acknowledges that information originally created and maintained in the HFA Database, regardless of form or format, is proprietary to HFA and comprises: (i) works of original authorship, including compiled information containing HFA's selection, arrangement and coordination and expression of such information or pre-existing material it has created, gathered or assembled; (ii) valuable confidential and trade secret information; and (iii) information that has been created, developed and maintained by HFA at great expense of time and money such that misappropriation or unauthorized use by others for commercial gain would unfairly and irreparably harm such party. Notwithstanding the foregoing or anything else contained in this Agreement, the parties acknowledge that certain of the information contained in the HFA Database may be duplicative of information that Licensee may have independently derived or acquired from a party not subject to a duty of confidentiality to HFA, and Licensee's use of such separately obtained information shall not be implicated by any of the provisions of this Agreement.

(b) Licensee shall not commit or permit any act or omission by its agents, employees or any third party or any user of Licensee's service that would impair HFA's proprietary and intellectual property rights in the HFA Information.

(c) Licensee agrees to notify HFA immediately upon obtaining any information regarding a threatened or actual infringement of HFA's rights in the HFA Information.

3.2 **Confidentiality of Information.** Each party covenants that during the Term, it may use Confidential Information as provided herein but that it shall not otherwise disclose any Confidential Information; *provided, however*, that it may disclose (i) any Confidential Information that enters the public domain through no fault of the other party; (ii) any Confidential Information that is independently derived or acquired from a party not subject to a duty of confidentiality to the other party; or (iii) any Confidential Information that is required to disclose pursuant to an order of a court of competent jurisdiction; *provided, however*, that in the event that a party is ordered to disclose any Confidential Information, it shall notify the other of such order. In addition,

each party covenants that after the Term, it shall neither use or disclose any Confidential Information except as provided in this Section 3.2.

#### **SECTION 4: OPERATIONS**

4.1 **Access.** HFA will provide Licensee access to its electronic licensing procedures and certain data relating thereto as provided in the Internet Music Licensing Agreement.

4.2 **Use Inspection Right.** During the Term of this Agreement and for a period of three years following the termination of this Agreement, Licensee agrees to permit HFA to inspect, on a semi-annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Information is used in Licensee's facilities and to furnish whatever assistance is reasonably necessary to permit HFA to determine Licensee's and/or its users' compliance with this Agreement.

#### **SECTION 5: REPRESENTATIONS AND WARRANTIES, COVENANTS AND INDEMNIFICATION**

5.1 **Due Authorization.** Each party represents and warrants that it has the right and power to enter into this Agreement, that this Agreement is duly authorized, executed and enforceable and that there is no outstanding contract, commitment or legal impediment which may limit, restrict or impair its ability to perform its obligations under this Agreement.

5.2 **Disclaimer of Warranty.** HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO THE HFA INFORMATION, INCLUDING, BUT NOT LIMITED TO, THE CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE TO THE LICENSEE FOR ANY LOSS OR INJURY ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT.

5.3 **No HFA Liability.** HFA WILL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER SUCH LIABILITY ARISES FROM CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE AND WHETHER OR NOT A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

5.4 **No Third Party Liability.** HFA shall not be liable to any third party including, without any limitation, any user of Licensee's service, in contract, tort, or

otherwise for any direct, indirect, incidental, or consequential loss or damage sustained by such party arising from the breach, negligent performance, or failure in performance by HFA or its officers, employees, or agents of the terms of this Agreement or otherwise arising from the delivery and use of the HFA Information.

#### 5.5 Indemnification.

(a) Indemnity by Licensee. Licensee agrees to indemnify, defend and hold harmless HFA (and any of its respective officers, directors, employees, Affiliates, successors and assigns) from and against any liabilities, damages, judgments, assessments (including reasonable attorneys' fees ("Losses") brought against HFA by a third party based upon, arising out of or due to, or otherwise in respect of: Licensee's breach of any of its representations, warranties, covenants or agreements set forth in this Agreement.

(b) Opportunity to Defend Third-Party Claims. Licensee may elect to compromise or defend, at its own expense and by its own counsel, any claim or the commencement (or threatened commencement) of a claim for indemnification asserted by HFA in writing hereunder (an "Asserted Liability") involving a claim by a third party; *provided, however*, that Licensee agrees in writing that it is obligated to indemnify HFA against such Asserted Liability. If Licensee elects to compromise or defend such Asserted Liability, it shall within thirty (30) days (or sooner, if the nature of the Asserted Liability so requires) notify HFA of its intent to do so, and HFA shall cooperate, at the reasonable expense of Licensee, in the compromise of, or defense against, such Asserted Liability. If Licensee elects without HFA's agreement not to compromise or defend the Asserted Liability, fails to notify HFA of its election as provided above or contests its obligation to indemnify under this Agreement, HFA may pay, compromise or defend such Asserted Liability at the reasonable expense of Licensee, except to the extent that it is subsequently determined or agreed that Licensee has no indemnity obligation hereunder with respect to such Asserted Liability. Notwithstanding the foregoing, neither Licensee nor HFA may settle or compromise any such Asserted Liability over the objection of the other; *provided, however*, that consent to settlement or compromise shall not be unreasonably withheld. In any event, HFA and Licensee may participate, at their own expense, in the defense of such Asserted Liability.

### SECTION 6: TERM AND TERMINATION

6.1 Term. This Agreement shall become effective as of the date hereof and will continue for the term of the Internet Music Licensing Agreement (the "Term") unless otherwise terminated pursuant to the termination provisions of this Agreement.

6.2 Termination. The occurrence of the following events shall be deemed material breaches and defaults of this Agreement by HFA or Licensee (as the case may be):

(a) if either party breaches in any material respect any representation, warranty or agreement or any other material obligation in this Agreement, unless such breach or failure is fully cured no later than thirty (30) days from the date of written notice of such breach to such party;

(b) to the extent permitted by applicable law, in the event of Licensee's dissolution or the liquidation of all of Licensee's assets, or the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization, by, for or against Licensee, or in the event of the appointment of a receiver or a trustee for all or a portion of its property, or in the event that Licensee shall make an assignment for the benefit of creditors or commit any act for, or in, bankruptcy or become insolvent; or

Upon the occurrence of any of the events described in the foregoing clause (b), this Agreement shall, with no further action on the part of HFA, terminate (such termination shall be without prejudice to any rights or claims HFA may have at law, in equity or otherwise) and all rights granted under this Agreement shall immediately, with no further action on the part of HFA, forthwith revert to HFA. Upon the occurrence of any of the events described in the foregoing clause (a) and failure to cure as provided in clause (a), the non-breaching party shall have the option to terminate this Agreement upon written notice to the breaching party. In the event HFA terminates this Agreement pursuant to the foregoing clause (a) because of a breach caused by Licensee, such termination shall be without prejudice to any rights or claims HFA may have at law, in equity or otherwise and all rights granted under this Agreement shall immediately, with no further action on the part of HFA, revert to HFA (the "Termination").

6.3 **Return of HFA Materials.** Promptly following termination of this Agreement for any reason, Licensee shall irrevocably purge or destroy any and all copies of the HFA Information (including without limitation, any derivations or summaries of such information) from Licensee's databases and other systems or any systems under Licensee's direct or indirect control, if any, and any other media on which any HFA Information may have been provided, together with all copies thereof, and all other HFA Information in its possession, whether in printed or machine readable form and certify in writing to HFA of such destruction.

## SECTION 7: PROPRIETARY RIGHTS

7.1 **HFA Rights.** The parties acknowledge that, as between the parties, HFA owns all rights in and to the HFA Information, including all copyright, trade secrets, and all other intellectual property and proprietary rights embodied therein. HFA shall have the exclusive right, but no obligation, to pursue any possible infringement of any proprietary rights associated with the foregoing, in its sole discretion.

## SECTION 8: MISCELLANEOUS

8.1 **Specific Performance.** The parties acknowledge that breach of Sections 2, 3.2 or 6.3 may cause irreparable harm, the extent of which would be difficult

to ascertain. Accordingly, they agree that, in addition to any other legal remedies to which a non-breaching party might be entitled, such party shall be entitled to seek immediate injunctive relief in the event of a breach of the provisions of such Sections.

8.2 **Notices.** All notices and other communications shall be in writing and shall be deemed given when delivered personally, upon a receipt of a transmittal confirmation if sent by facsimile or like transmission, three (3) days after the date sent by Federal Express, Express Mail or similar overnight courier service or five (5) days after the date sent by first class U.S. mail to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number for a party as shall be specified by like notice):

if to HFA:

The Harry Fox Agency  
711 Third Avenue  
New York, New York 10017  
Attention: President  
Telephone: (212) 922-3260  
Facsimile: (212) 953-2471

with a copy to:

Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, New York 10019-6064  
Attention: Carey R. Ramos, Esq.  
Telephone: (212) 373-3240  
Facsimile: (212) 373-2380

if to Licensee:

REDACTED

8.3 **Amendment.** This Agreement may not be amended except by written instrument executed by HFA and Licensee.

8.4 **Binding Agreement; Assignment.** No assignment of this Agreement shall be made by either party without the prior written consent of either party, except that HFA may assign its rights and obligations under this Agreement to an Affiliate or by operation of law and either party may assign its rights under this Agreement, without the prior written consent of the other, to any successor in interest due to a merger or acquisition, or to any party who acquires all or substantially all of the

assets of such party, provided such successor assumes in writing the obligations of this Agreement, provided further, that this Agreement may only be assigned in connection with an assignment of the Internet Music Licensing Agreement. The terms of this Agreement shall be binding upon and inure to the benefit of any successor or permitted assignee.

8.5 **Headings.** The headings of sections and paragraphs in this Agreement are included for convenience of reference only and shall not control the meaning or interpretation of any of the provisions of this Agreement.

8.6 **Survival of Certain Provisions.** Notwithstanding the termination or expiration of this Agreement, the provisions of Sections 1, 2.2, 3, 4.2, 5.2, 5.3, 5.4, 5.5, 6, 7 and 8 shall survive and continue and shall bind the parties and their legal representatives, successors and permitted assigns.

8.7 **Waiver.** The failure of either party at any time to require performance by the other party of any provision of this Agreement shall in no way affect the right to require such performance at any time thereafter, nor shall the waiver by either party of a breach of any provision of this Agreement be taken or held to be a waiver of any succeeding breach of such provision or as a waiver of the provision itself.

8.8 **Severability.** If any provision of this Agreement or the application of this Agreement to any person or circumstance shall be to any extent held invalid or unenforceable, the remainder of the Agreement, or the application of such provision to persons or circumstances as to which it is not held to be invalid or unenforceable, shall not be affected thereby, and each provision shall be valid and be enforced to the fullest extent permitted by law.

8.9 **Force Majeure.** Performance by either party under this Agreement (other than payments of any amounts due HFA under this Agreement) shall be subject to and shall be excused to the extent that it shall be rendered impossible by reason of fire, flood, accident, storm, war, riot, government interference, rationing, allocation, embargo, export and import control, currency control, strike, walkout, subject to their being beyond the reasonable control of or mitigation by each party.

8.10 **Entire Agreement.** All references in this Agreement to Sections shall be deemed references to such parts of this Agreement, unless the context shall otherwise require. This Agreement contains the entire understanding of the parties and supersedes all previous verbal and written agreements on the subject of this Agreement.

8.11 **Relationship of Parties.** This Agreement does not create, and shall not be deemed to constitute, a partnership or joint venture between the parties and neither party nor any of its directors, officers, employees or agents shall, by virtue of the performance of their obligations under this Agreement, be deemed to be an employee of the other.

8.12 **No Third-Party Beneficiaries.** Nothing in this Agreement is intended to create any benefit, right or cause of action in or on behalf of any person or entity other than HFA or Licensee.

8.13 **Controlling Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to conflicts of law principles thereof).

8.14 **Assistance of Counsel.** Each party has had an opportunity for counsel to review the Agreement and as a result, both parties agree that no provisions shall be construed against the preparer.

8.15 **Counterparts.** The agreement may be executed in counterparts, each of which when so executed and delivered shall be an original, but both of such counterparts shall together constitute one and the same instrument.

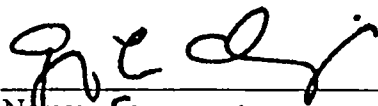
8.16 **Publicity.** Except as may be required by applicable law, neither party shall issue a publicity release or announcement or otherwise make any public disclosure concerning this Agreement or the transactions contemplated by this Agreement, without prior approval of the other party, such approval not to be unreasonably withheld, and which shall not unreasonably delay the issuing of any such publicity release. If any announcement is required by law to be made by any such party, prior to making such announcement such party will deliver a draft of such announcement to the other party and shall give the other party an opportunity to comment.

[Signature page follows]



The parties have executed this Data Access and Use Agreement as of the date first above written:

THE HARRY FOX AGENCY, INC.

By:   
Name: Gary L. Chargin  
Title: President + CEO

REDACTED

**EXHIBIT CO 0046**



The Harry Fox Agency, Inc.

711 Third Avenue  
New York, NY 10017

212-922-3266  
212-922-3299 FAX

jcharlesworth@harryfox.com  
www.harryfox.com

**Jacqueline C. Charlesworth**  
Senior Vice President  
General Counsel

RECEIVED

MAR 06 2003

February 21, 2003

LEGAL DEPARTMENT

Redacted

Re: Letter of Amendment

Dear Redacted

This will confirm that, effective as of January 1, 2003, by mutual agreement of the parties and upon execution of this letter of amendment ("Letter of Amendment") by an authorized representative of Redacted a Delaware Corporation ("Licensee"), the Agreement Concerning the Licensing of Certain Internet Music Subscription Services dated March 25, 2002 between Licensee and The Harry Fox Agency, Inc. ("HFA") ("Agreement") is amended as follows:

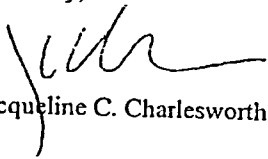
1. In accordance with the written instructions received by HFA from Redacted Licensee may seek licenses from Redacted under the Agreement. Licensee may also seek licenses under the Agreement from Redacted to the extent HFA receives written instruction from such publishers on some future date authorizing HFA to issue such licenses.
2. Notwithstanding anything to the contrary contained in Paragraph 4.1 of the Agreement, Licensee need not pay any additional advance funds in connection with the licensing of Redacted under the Agreement until the second anniversary of the Agreement, whereupon Licensee shall begin paying to HFA each month a supplementary advance payment of Redacted such monthly payment to be increased by Redacted for each of Redacted and Redacted HFA is instructed in the future to grant licenses under the Agreement by such publisher as of the month HFA is so instructed.

3. In consideration of the administrative burdens associated with HFA's increased licensing responsibilities under the Agreement as hereby amended, Licensee shall pay to HFA a one-time administrative fee of \_\_\_\_\_ upon execution of this Letter of Amendment.

**Redacted**

4. The Agreement is amended solely to the extent provided in this Letter of Amendment, and otherwise all of the provisions and terms of the Agreement shall remain in full force and effect.

Sincerely,



Jacqueline C. Charlesworth

AGREED AND ACCEPTED:

**Redacted**

**EXHIBIT CO 0047**

10-27-2002 10:00 0120000000

Agreement Concerning the Licensing of  
Certain Internet Music Subscription Services

This agreement (the "Agreement"), dated as of March 25, 2002 ("Effective Date"), is made by and between **REDACTED** ("Licensee") and The Harry Fox Agency, Inc. ("HFA"), (the "Parties").

WHEREAS, Licensee desires to offer to consumers certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works available to consumers by licensing such services;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and Licensee may prefer to make business decisions concerning the launch of Covered Services (as defined below) with greater assurance concerning the legal status of such services;

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to Licensee and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of unresolved legal issues and to facilitate the expeditious launch of digital music services, the Parties have reached this Agreement with respect to terms pursuant to which Licensee may obtain licenses to make On-Demand Streams and Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(c)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Covered Services. When Licensee seeks to use a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that

## 2. Covered Deliveries.

2.1 A License with respect to a musical work includes all reproduction, distribution and DPD rights necessary for Covered Services to make On-Demand Streams and Limited Downloads of that work, from the making of server reproductions to the transmission and local storage of the On-Demand Streams or Limited Downloads in all cases made subject to and in accordance with the terms hereunder. A License does not extend to other transmissions made by a Covered Service or to activities not encompassed by a mechanical license, including, without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to synchronize musical works with visual images resulting in audiovisual works, or karaoke rights, all of which rights are specifically reserved. The Parties agree that server reproductions made under a License to transmit On-Demand Streams or Limited Downloads may be used to make transmissions other than On-Demand Streams and Limited Downloads; provided that the foregoing is without prejudice to any applicable requirement, if any, that Licensee also obtain a license for such other transmissions made using such server reproductions. It is understood that this Agreement does not address or extend to any performance rights that may be implicated by the making of On-Demand Streams or Limited Downloads through Covered Services.

2.2 A License includes the right to make, and there shall be no separate payment or accounting for, On-Demand Streams of Promotional Excerpts (as defined below) of sound recordings of musical works licensed hereunder used for promotional purposes, provided that the relevant copyright owner or copyright owners of such sound recordings have duly authorized the relevant copyright owner or copyright owners of such musical work (or an organization of copyright owners designated by such copyright owners as their common agent) to make On-Demand Streams of Promotional Excerpts of that sound recording for the purpose of promoting that musical work without payment of any royalty. "Promotional Excerpt" is defined as a stream consisting of no more than thirty (30) seconds of playing time of the sound recording of a musical work, or in the case of sound recordings with a playing time of more than five minutes, a stream that is of no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of the sound recording of the musical work.

## 3. Licensing Process.

3.1 Commencing on the Effective Date, Licensee may submit License requests in electronic form, either individually or batched, and either for On-Demand Streams and/or Limited Downloads alone or in combination with other configurations, substantially in accordance with Exhibit A. Promptly after the Effective Date, the Parties shall arrange discussions between appropriate personnel of HFA and Licensee concerning electronic licensing procedures, with the goal of refining and testing HFA's electronic licensing procedures so that they can be used readily for the issuance of mechanical licenses expeditiously and with the goal of enhancing such procedures so that they later can be used readily by Licensee to request and obtain mechanical licenses for

all configurations for which it desires licenses in a single request. In addition, Licensee may submit License requests by other means generally accepted by HFA, including but not limited to HFA's new web-based licensing system (when it becomes available), and HFA's standard paper form (but only using paper forms for complex License requests, (e.g., requests involving medleys or samples), in limited numbers during times when electronic licensing capabilities are unavailable, or at other times in numbers that are generally consistent with Licensee's past use, if any, of paper forms and in any case in numbers that do not exceed what HFA can reasonably be expected to process under the circumstances. HFA may modify its license request and license forms from time to time, provided that it gives reasonable notice thereof to Licensee and such modifications do not unreasonably affect the ability of Licensee to submit license requests and obtain licenses. License forms may be issued electronically or in paper form, but when Licensee submits a License request in electronic form in accordance with this Section 3.1, HFA shall, promptly after processing the License request, return to Licensee an electronic file substantially in accordance with Exhibit A, with (1) the addition of that information indicated in Exhibit A as being "output" fields, (2) the addition of information, other than individual publisher share information, to complete any blank optional fields in the request, to the extent that such information is available in HFA's databases and is matched to the request in the License issuance process, (3) the substitution of information concerning HFA publisher-principal names where such information in HFA's databases is different from that in the request, and (4) the aggregated share of Participating HFA Publishers. If Licensee submits a License request in accordance with this Section 3.1 but the request contains insufficient information for HFA to find a match for the relevant work in its databases, HFA will work with Licensee to provide the information necessary to enable a License to be issued, and if Licensee resubmits such request with the necessary information and the License can be issued, the provisions of Section 3.4 shall apply from the date of the original request. The Parties acknowledge the importance to HFA and music publishers of having License requests submitted promptly, and the importance to Licensee of having License forms issued promptly. The Parties shall cooperate in good faith to promote each of those goals.

3.2 The authority of HFA to license any individual musical work on behalf of its publisher-principals is subject to the approval of the relevant publisher-principal. HFA shall not require its publisher principals to opt in to this Agreement either before or after commencing to issue Licenses, but ; HFA will establish an opt out period before commencing to issue Licenses, which period shall end on April 12, 2002. If an HFA publisher-principal at any time requests that HFA not issue Licenses on its behalf (either with respect to particular musical works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a License issued prior to such request. Through December 31, 2002, HFA shall notify Licensee quarterly of HFA publisher principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement.

3.3 HFA shall issue mechanical licenses for DPD configurations (including but not limited to Licenses under this Agreement) with respect



configurations (including but not limited to Licenses under this Agreement) with respect to a musical work in its entirety if one or more of its publisher-principals owns or controls a partial interest in such musical work, even if other co-owners of such musical work are not HFA publisher-principals, except that, pursuant to Section 3.2, if all the HFA publisher-principals that own or control a partial interest in such work request that HFA not issue mechanical licenses on their behalf, HFA will not issue such licenses. In the case of a mechanical license issued as described in this Section 3.3, Licensee shall pay directly to each co-owner that is not an HFA publisher-principal (or such co-owner's authorized payee) such co-owner's share of the applicable royalty payments under Section 6.1.

3.4 License forms issued by HFA pursuant to this Agreement shall be retroactive to the date of the License request made by Licensee on or after the Effective Date in accordance with Section 3.1. To the extent that Licensee makes On-Demand Streams and Limited Downloads of musical works pending the processing by HFA of license forms in response to proper License requests submitted on or after the Effective Date in accordance with Section 3.1, HFA shall not directly or indirectly file, encourage, aid, support, finance, contribute to, promote, or participate in any claim, suit, action or proceeding asserting that such activities are infringing.

3.5 Subject to Section 3.3, HFA shall also accept License requests to make On-Demand Streams and Limited Downloads through Covered Services of musical works as to which no HFA publisher-principal has any ownership interest or control, in whole or in part, and for which a License is not otherwise available under this Agreement. In such a case, HFA shall use commercially reasonable efforts to secure the requested Licenses from the relevant non-HFA publisher-principals on the same terms as apply to HFA publisher-principals under this Agreement. (Non-HFA publisher-principals who grant Licenses through this arrangement shall be referred to as "Participating Independent Publishers".) In addition to any commission charged to the Participating Independent Publisher, HFA may charge Licensee a one-time administrative fee of ninety-five dollars (\$95) for each publisher that agrees to become a Participating Independent Publisher (it being understood that no such administrative fee shall be payable for any subsequent Licenses issued on behalf of that Participating Independent Publisher to Licensee), unless the Participating Independent Publisher also authorizes HFA to grant mechanical licenses other than Licenses under this Agreement, in which case no such fee shall apply. The Advance Payment described in Article 4 may be applied to such administrative fee when payable by Licensee, and HFA shall provide to Licensee or an independent accounting firm designated by Licensee sufficient information concerning liability for such administrative fee to allow reconciliation of the Advance Payments as described in Section 4.4. When HFA arranges Licenses from Participating Independent Publishers pursuant to this Section 3.5, HFA shall collect and distribute mechanical royalties to such Participating Independent Publisher (or other authorized payees) unless Licensee requests to make such payments directly.

3.6 HFA and Licensee shall enter into a Data Access and Use

Agreement, in the form attached hereto as Exhibit B.

3.7 Nothing in this Agreement, including but not limited to the availability of Licenses or the procedures for obtaining the same, shall preclude Licensee from at any time serving or filing a notice of intention to obtain a compulsory license in accordance with applicable law or, other than in Article 8, imply that any notice of intention so served or filed is valid or invalid. Nothing in this Agreement shall preclude Licensee from seeking, or HFA or any of its publisher-principals from granting, direct licenses to Licensee, including without limitation for use of musical works on the Covered Services, on whatever terms might be agreed upon between the relevant parties.

4. Advance Payment.

4.1 Subject to written confirmation prior to the execution of this Agreement that Licensee has entered into direct licensing arrangements for rights equivalent to those granted herein with three (3) specified Major HFA Publishers, Licensee shall pay to HFA a non-refundable advance royalty payment equal to

**REDACTED**

the Percent Market Share of the  
"Major HFA Publisher" shall

mean any HFA publisher-principal that ranks among the top ten (10) HFA publisher-principals based upon total royalties distributed by HFA to all HFA publisher-principals during the calendar years 2000 and 2001. "Percent Market Share" shall be calculated by dividing (a) the total royalties distributed to all Participating HFA Publishers during the calendar years 2000 and 2001 by (b) the total royalties distributed by HFA to all HFA publisher-principals during the calendar years 2000 and 2001. (For the avoidance of doubt, it is understood that the Major HFA Publishers identified as having entered into direct licensing arrangements with Licensee shall not be considered Participating HFA Publishers and the total royalties distributed by HFA to the Major HFA Publishers shall not be included in the calculation of Percent Market Share.). Licensee shall pay the Advance Payment in three (3) installments as follows: On or before the Effective Date, Licensee shall pay to HFA

**REDACTED**

Within thirty (30) days after the expiration of the opt-out period referenced in Section 3.2, HFA shall notify Licensee of the amount of the remaining balance of the Advance Payment. Such remaining balance shall be paid to HFA by Licensee in two further equal installments on or before October 1, 2002 and on or before December 31, 2002, respectively. If, by the second anniversary of the Effective Date, there has then been no final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, then, subject to Section 4.2, until such a determination, Licensee shall each month pay to HFA a total supplementary advance payment of

**REDACTED**

multiplied by the Percent Market Share (calculated as described above). It is understood that if Licensee provides HFA written confirmation on or prior to the expiration of the opt-out period that it has entered into direct licensing arrangements for rights equivalent to those granted herein with a fourth Major HFA Publisher, then Licensee shall be credited

**REDACTED**

toward the balance of the Advance Payment,

and the amount of the supplemental advance payments that may become payable after the second anniversary of the Effective Date shall be reduced the same percentage as the reduction in the Advance Payment.

4.2 Effective at the second anniversary of the Effective Date or any time thereafter, Licensee may terminate this Agreement upon thirty (30) days advance written notice to HFA. In the event Licensee does so, all Licenses previously issued under this Agreement shall terminate at the same time as this Agreement, without prejudice to the right of Licensee thereafter to obtain new licenses under 17 U.S.C. § 115. In the case of termination by Licensee (a) payments shall be due in accordance with Section 6.1 for activities under this Agreement prior to the termination of the relevant Licenses, (b) Advance Payments may be applied against such payments in accordance with Section 4.4, and (c) to the extent remaining, Advance Payments also may be applied to royalties due under new licenses for On-Demand Streams and Limited Downloads made through Covered Services, which licenses are issued by HFA at least one year after the relevant date of termination of Licensee's Licenses. In addition to the foregoing, if there is a decision of the U.S. Copyright Office or a court, or any new legislation, inconsistent with Section 8.1, with the result that mechanical royalties are not required to be paid for some or all On-Demand Streams and/or Limited Downloads made through Covered Services, then the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be reduced to take into account such decision or legislation, based on actual usage under this Agreement to date, with the exact amount of such reduction to be agreed upon by the Parties promptly after such decision or legislation; provided that if any such decision is appealed and finally reversed on appeal, the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be restored, and Licensee shall promptly pay to HFA the total amount by which the supplementary Advance Payment was reduced in the interim.

4.3 HFA shall deposit Advance Payments into an interest-bearing bank account (with such interest being treated as part of the Advance Payment). HFA shall be free to distribute the initial and supplementary Advance Payments to HFA publisher-principals in accordance with a reasonable and nondiscriminatory methodology based on market share, actual usage or a per musical work payment (which methodology HFA shall provide to Licensee), as well as to any Participating Independent Publishers pursuant to Section 3.5. Except insofar as it is recouped pursuant to Sections 4.4 and/or 4.5, the Advance Payment shall be nonrefundable.

4.4 Upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, the total amount of Advance Payments (including interest) shall be applied against undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Licensee under this Agreement. Such Advance Payments shall be applied to the account of Licensee. If the Advance Payments are not fully recouped at such time, any remainder of the Advance Payments thereafter shall be applied against all undisputed amounts owed to HFA on

behalf of its publisher-principals and Participating Independent Publishers by Licensee under mechanical licenses issued by HFA for On-Demand Streams and Limited Downloads made through Covered Services (including but not limited to Licenses under this Agreement), until such amount is fully recouped.

4.5 At the request of HFA, with Licensee's written consent, which consent shall not be withheld unreasonably, Advance Payments may be applied to other undisputed amounts (e.g., other mechanical royalties) owed by Licensee to HFA on behalf of its publisher-principals.

5. Royalty. The royalty rate payable under a License shall be determined through negotiation and/or a CARP proceeding. The applicable rate will be structured as determined through negotiation or by the CARP, and may comprise separate royalty rate components for distinct uses of the musical work authorized by the License. The Parties shall meet to negotiate royalty rates in good faith. HFA reserves its right to seek interest as a part of such royalty rate determination. Licensee reserves its right to seek to have such royalty rate determination reflect any payments under foreign copyrights in the case where On-Demand Streams or Limited Downloads are transmitted to users outside of the United States. Whether royalty rates are determined by negotiation or a CARP, and regardless of how royalty rate categories may be denominated, the Parties shall seek a determination of royalty rates such that it is clear which royalty rates are applicable to each of On-Demand Streams and Limited Downloads.

#### 6. Accounting and Payment.

6.1 Beginning with the issuance of a License, Licensee will be required to account to HFA on a quarterly basis for activity under such License, 45 days after the close of each quarter, providing information comparable to that presently provided by major record labels for physical products, and specifically including the number of On-Demand Streams and Limited Downloads of each work made during such quarter. Without limitation, quarterly reports shall include a breakdown of On-Demand Streams and Limited Downloads made by Covered Services under Licenses in the applicable quarter, by musical work and delivery method code (indicating On-Demand Streams and/or Limited Downloads), and including ISRC number if available, catalog number if available and HFA license number if available (in the same manner indicated by Licensee in its License request), and shall identify the specific Covered Services in which such On-Demand Streams and Limited Downloads were made. Licensee shall preserve all usage and financial data that reasonably should be expected to be relevant, upon the determination of royalty rates, to the calculation of royalties hereunder and use commercially reasonable efforts to do so for each Covered Service it operates hereunder. Subject to Article 4 and Section 3.3, upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, Licensee shall make the applicable payment for all previous quarters then completed, from the launch of the applicable Covered Services to date, within 45 days, to be accompanied by a cumulative statement setting forth and aggregating the

information provided in the previous quarterly reports supplied under this Agreement. Thereafter, on a quarterly basis, 45 days after the close of each quarter, Licensee shall account to HFA for activities and/or revenues realized on such activities during such quarter as determined through negotiation and/or by regulation, providing such information as is required by regulation, a CARP, and/or a negotiated rate agreement, and, subject to Article 4 and Section 3.3, pay royalties at the applicable rate. Notwithstanding the foregoing, HFA reserves its right to seek more frequent access, including without limitation real-time access, to usage information.

6.2 At the request of HFA, Licensee shall accompany its quarterly reports with any available data in addition to that described in Section 6.1 concerning the numbers of On-Demand Streams and Limited Downloads made through Covered Services operated by Licensee (but not any personally identifying information), which data is regularly gathered or compiled by Licensee; provided that Licensee may provide any such data to HFA in whatever form it is available to Licensee in the ordinary course of its business and subject to any applicable confidentiality and other contractual use restrictions; and provided further that, before making any such request, HFA shall review with Licensee the types of such data Licensee has and can disclose to HFA, and the form in which such data is available, and HFA shall not request, and Licensee shall not be required to provide, data that (given the volume and form of such data; the degree to which such data is reflected in quarterly reports, the data processing capabilities of HFA and Licensee, HFA's intentions to use such information, and other relevant factors) would not be commercially reasonable to provide. In addition, to the extent such information is available to Licensee and can be disclosed to HFA hereunder, at the request of HFA, Licensee shall accompany its quarterly reports with the total number of subscribers to and total number of subscriber months for each Covered Service operated by Licensee during the reporting period; provided that any such information relating to a Covered Service operated by Licensee shall be subject to an appropriate confidentiality restriction, and any such information provided to Licensee by a third party shall be subject to any applicable confidentiality and other contractual use restrictions. It is understood that HFA may disclose information provided to HFA under this Section 6.2, provided that the data is in an aggregate form from which data identifiable as pertaining to Licensee cannot be readily derived. If HFA intends to disclose such information, solely in a legal proceeding, in a form identifiable as pertaining to Licensee, HFA shall notify Licensee reasonably prior to such disclosure so that the parties may enter into a reasonable confidentiality agreement or protective order.

7. Term. The term of this Agreement shall commence on the Effective Date and, subject to Sections 4.2 and 8.5, continue until the final non-appealable determination of royalty rates for each of On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding. New Licenses shall continue to be issued pursuant to this Agreement for the duration of such term. Thereafter, Licensee may request, and HFA shall issue, mechanical licenses covering On-Demand Streams and Limited Downloads at the applicable royalty rates in accordance with its customary practices for the issuance of licenses where there is an applicable statutory

rate, which the Parties currently understand to include the means of application described in Section 3.1. Notwithstanding the foregoing, Licenses once issued under this arrangement shall remain in effect unless terminated for default in respect to the Advance Payment or royalties due (once royalty rates are determined) or accounting (either before or after royalty rates are determined) pursuant to 17 U.S.C. § 115(c)(6) (or other applicable provision of law, if any), it being understood that a License may not be terminated for such a default where the default is remedied as provided in 17 U.S.C. § 115(c)(6). In addition, the provisions of Sections 1.2, 1.3, 1.4, 4.2, 4.4 and 4.5, and of Articles 6, 7 and 13, shall survive the expiration or termination of this Agreement or any License under this Agreement.

#### 8. Legal Framework for Agreement.

8.1 Subject to the other provisions of this Article 8, in order to avoid litigation and to provide assurance to Licensee in connection with the launch of its digital music services and enable HFA's issuance of license forms for Covered Services hereunder:

(a) The Parties agree that under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act. The Parties further agree that under current law the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of a DPD, and thus does not require a mechanical license. The foregoing does not express or imply any agreement that, and shall not be used to support any argument that, the process of making On-Demand Streams other than through Covered Services, or the process of making streams that would not qualify for a statutory license under Section 114(d)(2) of the Copyright Act (including, without limitation, because such streams are part of an "interactive service" (as that term is defined in Section 114(j)(7)) or exceed the "sound recording performance complement" (as that term is defined in Section 114(j)(13)) does or does not involve the making and distribution of a DPD, and the Parties expressly reserve all their rights with respect to that issue.

(b) The Parties agree that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

(c) The Parties agree that under current law a compulsory license to make On-Demand Streams and Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the On-Demand Streams and Limited Downloads) is available under Section 115 of the Copyright Act.

8.2 Subject to Sections 8.3 and 8.5, for the term of this Agreement, no Party and no Participating HFA Publisher shall take a position contrary to or inconsistent with the agreements in Section 8.1 as to current law, or lend support or resources, financial or otherwise, to any other person or entity taking a contrary or inconsistent position, before the Copyright Office, a CARP, a court or any other government office or tribunal. Thereafter, no Party and no Participating HFA Publisher shall commence or lend support to any action in court to challenge the validity of the rates determined pursuant to Article 5 on the ground that On-Demand Streams and Limited Downloads do not involve the making or distribution of DPDs. It is understood that, for purposes of this Section 8.2, Licensee or Participating HFA Publishers shall not be deemed to lend financial support or resources to affiliated entities merely through intra-enterprise financial arrangements in the ordinary course of business or merely by paying membership dues or fees that a trade association ordinarily requires of its members or merely sitting on the board of directors of a trade association without actively lending support to any activities contrary or inconsistent with Section 8.1.

8.3 Notwithstanding Sections 8.1 and 8.2, the Parties and Participating HFA Publishers may at any time (1) raise and litigate (including, without limitation, before a CARP) the economic value of, and the appropriate royalty rates to be applied to, On-Demand Streams and Limited Downloads; (2) take or support any position they choose with respect to sound recordings (as distinguished from any musical works embodied therein) and the rights therein, including, without limitation, rights under Sections 106 and 114 of the Copyright Act, and (3) make or lend support to any arguments they choose to prosecute, or defend or counterclaim against, an infringement claim relating to activities before the Effective Date. Notwithstanding Sections 8.1 and 8.2, Licensee may at any time make or lend support to any arguments they choose to defend or counterclaim against an infringement claim relating to activities on or after the Effective Date, in the event that a License with respect to the relevant works is not available hereunder (it being understood that, subject to Section 8.4, HFA and Participating HFA Publishers may participate in the litigation of any such claim, so long as their doing so is consistent with Sections 8.1 and 8.2). The Parties agree that they will act in good faith not to induce, promote or encourage the litigation of an infringement claim relating to activities as described in the immediately preceding sentence.

8.4 To the extent that an action being litigated by Licensee involves the question of the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c) for a musical work for which a License is not available under this Agreement, HFA shall not participate in or lend support to such action. The Parties agree that they will act in good faith not to induce, promote or

encourage litigation concerning the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c). For purposes of this Article 8, HFA shall include its parent National Music Publishers' Association, Inc.

8.5 To the extent that a final, non-appealable decision of the Copyright Office or a court, or any new legislation, is inconsistent with Section 8.1, this Agreement shall be inapplicable to the extent of the inconsistency as of the date thereof, but subject to Article 4, Licensee shall not be entitled to a refund of any monies paid prior to such date.

8.6 Nothing in this Article 8 shall be used by, or be enforceable by, a third party not a Party to this Agreement, in any manner or in any context, including without limitation in any legal proceeding. This Agreement does not give rise to any third party beneficiary rights in any party other than Participating HFA Publishers. The agreements set forth in this Article 8 and the course of dealing hereunder shall be inadmissible, and shall not be used to support any argument of law, in any litigation or arbitration relating to (1) activities before the Effective Date or (2) activities other than making and distributing On Demand Streams and Limited Downloads through Covered Services, except making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act.

## 9. Security.

9.1 For all OnDemand Streams and Limited Downloads provided by Licensee as a part of the Covered Services, Licensee shall prevent by means of software and/or hardware functional limitations: (i) the re-transmission or exportation of a sound recording embodying a musical work from the user's personal computer or other device, whether now known or hereafter invented, to which the sound recording is initially transmitted to the User by the Covered Service other than according to the criteria set forth in this Article 9; and (ii) the creation by any means of a sound recording file or collection of sound recording files embodying musical works that are not secured by the Licensee's copyright protection technology that shall enforce the use limitations set forth herein. For clarification, the term "re-transmission" does not include the rendering by a user's personal computer of a sound recording embodying licensed works into audio for the purpose of such user's immediate perception.

9.2 Without limitation, the Licensee shall properly and completely implement security technologies and methods that are commercially acceptable to and generally used by the music industry to deliver On-Demand Streams and Limited Downloads of sound recordings embodying musical works in a secure manner through Covered Services, such that:

- (a) in each case, the delivery or playback of a sound recording is reliably limited to the single intended device authenticated by the Licensee as belonging to a current subscriber and only in accordance with the use limitation rule applicable to such sound recording;



(b) all On-Demand Streams are protected in a manner so as to prevent software applications from being able to capture the streams to be saved for later rendering on any device;

(c) all Limited Downloads and On-Demand Streams shall only be transmitted to devices that fully and accurately support the security technologies used by the Covered Service, in order to accurately enforce the applicable use limitation rules, including, without limitation, the applicable time limits and playback limits imposed by the definition of Covered Services in Article 1;

(d) On-Demand Streams and Limited Downloads cannot be re-transmitted from the intended destination device to any other device, whether now known or hereafter invented, except where a sound recording is in a fully encrypted format that is unplayable on any such other device in any manner, whether now known or hereafter invented;

(e) the Licensee at all times maintains an accurate count of the number and type of transmissions (both On-Demand Streams and Limited Downloads) into user's devices from either the Covered Service directly or through the users' personal computer or other intermediate hosting device, whether now known or hereafter invented, the identity of the copyrighted work transmitted in each case, the applicable use limitation rule for such work, and all information necessary to timely fulfill the accounting requirements of Article 6 herein and any other obligations of Licensee under this Agreement. 9.3 In the event of a breach of any security technology(ies) used by Licensee to perform its obligations under Section 9, or as otherwise set forth in this Agreement, Licensee shall use its best efforts to devise a solution to such security breach (or cause such solution to be devised and implemented) or alternatively, immediately cease all distribution of the licensed works. Licensee shall restore as quickly as possible the integrity of the security technologies used in the operation of the Covered Services and shall keep HFA reasonably informed as to the status thereof.

9.4 Licensee shall not edit, alter or defeat any copyright protection technology or mechanism embedded in or associated with the sound recordings embodying the licensed works.

9.5 To the extent the Licensee or the Covered Services use third-party technology in order to operate, Licensee shall use its reasonable best efforts to maintain and upgrade such technology by diligently monitoring any third-party announcement made available to Licensee of bug-fixes, security holes and functionality improvements, obtaining such upgrades, and installing, testing and distributing such upgrades as necessary to maintain the integrity of the Covered Services.

9.6 Licensee shall use its reasonable best efforts to prevent the creation of any unauthorized copies of any licensed works in any facilities in its control in any form (including but not limited to, copies created by employees or contractors

03/21/2004

outside the immediate scope of their employment), and shall use its commercially reasonable efforts to prevent the creation of such unauthorized copies by any users of the Covered Services. If Licensee learns of any circumvention described in Section 9.3 above or of any unauthorized manufacture, advertising, distribution, lease or sale of the licensed works (any of the foregoing an "Unauthorized Use"), Licensee shall promptly provide HFA with written notification of such Unauthorized Use and take all reasonable steps, and reasonably cooperate with HFA, to prevent such Unauthorized Use. Without limiting any other rights and remedies of HFA and its Licensors, if HFA learns, and provides Licensee with reasonably credible evidence, that there are widespread, significant and substantial Unauthorized Uses, upon forty-five (45) days' notice by HFA, Licensee must, unless it eliminates such Unauthorized Uses to the satisfaction of HFA within the forty-five (45) day period, suspend all On-Demand Streams or Limited Downloads of the licensed works under this Agreement pending Licensee's elimination of such Unauthorized Uses to the satisfaction of HFA. Licensee will, on a quarterly basis, inform HFA of all known breaches or attempted breaches of its security measures and Licensee's response to each of those breaches or attempted breaches.

9.7 Licensee agrees that any breach of the provisions set forth in this Article 9 is a material breach of this agreement and, in addition to the remedies set forth in 9.6, would entitle HFA or any affected HFA publisher-principal to specific performance and/or to terminate any licenses granted hereunder in addition to any other remedies at law or equity.

10. Electronic Reporting. The Parties agree to work together in good faith to implement means whereby accounting information relating to Licenses will be provided to HFA in electronic, machine-readable form.

11. Audits. The parties agree that, as circumstances dictate, they will conduct good faith discussions concerning the employment of a mutually acceptable outside auditor to certify, as appropriate, the accuracy and reliability of Licensee's content delivery systems, digital rights management systems, subscriber payment and accounting systems and other relevant technology and business operations in lieu of HFA's conducting its own audit of Licensee according to its customary practices.

12. Publicity. Licensee and HFA will issue a joint press release announcing this arrangement. In HFA's communications to its members concerning this Agreement, it shall recommend that HFA members and HFA publisher-principals avail themselves of this Agreement.

13. Miscellaneous.

13.1 Assignment. This Agreement shall be binding upon and inure to the benefit of all of the parties and their respective permitted successors and permitted assigns. Any assignment or transfer by Licensee of any of its rights or licenses under this Agreement shall require the prior written consent of HFA, provided however, that notwithstanding the foregoing, Licensee may assign its rights and licenses under this

Agreement, without the prior written consent of HFA, to any successor in interest due to a merger or acquisition, or to any party who acquires all or substantially all of the assets of Licensee, provided such successor assumes in writing the obligations of Licensee under this Agreement.

13.2 Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York as applied to contracts performed entirely within the State of New York.

13.3 Amendment. This Agreement may be modified or amended only by a writing signed by each of the Parties.

13.4 Entire Agreement. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

13.5 Counterparts. This Agreement may be executed in counterparts, including by means of facsimile, each of which shall be deemed to be an original, but which taken together shall constitute one agreement.

13.6 Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

13.7 Notices. All notices and other communications shall be in writing and shall be deemed given when delivered personally, upon a receipt of a transmittal confirmation if sent by facsimile or like transmission, three (3) days after the date sent by Federal Express, Express Mail or similar overnight courier service or five (5) days after the date sent by first class U.S. mail to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number for a party as shall be specified by like notice):

if to HFA:

The Harry Fox Agency  
711 Third Avenue  
New York, New York 10017  
Attention: President  
Telephone: (212) 922-3260  
Facsimile: (212) 953-2471

with a copy to:

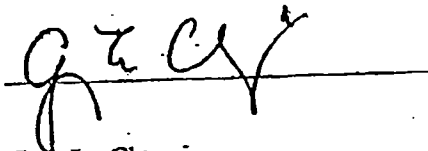
Paul, Weiss, Riskind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, New York 10019-6064  
Attention: Carey R. Ramos, Esq.  
Telephone: (212) 373-3240  
Facsimile: (212) 373-2380

if to Licensee:

**REDACTED**

13.8 Assistance of Counsel. Each party has been represented by counsel, who has reviewed this agreement and discussed the terms herein with his or her respective client prior to execution.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of  
the Effective Date.

A handwritten signature in dark ink, appearing to read "G L Churgin", is written over a horizontal line.

Gary L. Churgin  
President and CEO, HFA

REDACTED



## Electronic License Request & Output File Layout

### Acceptable Data Formats:

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

Description	Type	Length	Decimal	Input Option
1 Manufacturer Number	A	6		M
2 Transaction Date	N	8	0	M
3 Manufacturer Request Number	N	8	0	M
4 Label Name	A	15		M
5 ISRC Code	A	15		M
6 Playing Time - Minutes	N	3	0	M
7 Playing Time - Seconds	N	2	0	M
8 Artist	A	200		M
9 Song Title	A	200		M
10 A/K/A Song Title	A	200		O
11 ISWC Code	A	11		O
12 HFA Song Code	A	6		O
13 Song Writer(s)	A	200		C*
14 Publisher Name	A	60		C*
15 HFA Publisher Number	A	6		O
16 Publisher Share	N	7	4	O
17 Catalog Number	A	15		C*
18 Album (physical product) Title	A	200		C*
19 UPC Code	A	16		C*
20 Configuration Code	A	2		M
21 License Type	A	1		M
22 Server Fixation Date	N	8	0	M
23 Rate Code	A	1		C**
24 Rate in Cents	N	7	7	C**
25 Rate in Percentage of Statutory	N	5	2	C**
26 Rate in Percentage of Minimum Statutory	N	5	2	C**
27 HFA License Number	N	10		Input/Output
28 HFA License Status Code #1	A	2		Input/Output
29 HFA Flag for Amended Publisher Data	A	1		Input/Output ***
30 Publisher Status	A	1		Input/Output
31 Total HFA Represented Share	N	7	4	Input/Output
32 HFA License Status Code #2	A	2		Input/Output
33 HFA License Status Code #3	A	2		Input/Output
34 User Defined	A	30		Input/Output

### KEY:

#### TYPE:

- A = Alphanumeric Field
- N = Numeric Field

LENGTH: For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required

DECIMAL: Number of characters after decimal (for numeric fields only)

#### INPUT OPTION:

- M = Mandatory
- O = Optional
- C\* = Conditional --- As agreed, label must provide either: (a) Songwriter \_or\_ (b) Publisher, Catalog Number, Album Title and UPC. If (a) is provided, then (b) is not required; and vice versa.
- C\*\* = Conditional --- One of the rate code fields from 23-26 must be completed

\*\*\* All input/output fields should be left blank upon initial license submission, EXCEPT for Field 29 which should be populated with the letter R in the input file IF the record is a resubmission that has been amended.



## Electronic License File Field Definitions

	Field	Type: Mandatory (M) Optional (O) Conditional (C)	Explanation	Example
1	Manufacturer Number	M	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	M	Date electronic license request submitted to HFA	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
3	Manufacturer Request Number	M	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested	12345678
4	Label Name	M	The name of the record label that produced the applicable recording	Epic
5	ISRC Code	M	International Standard Recording Code. ISRC code assigned to the recording by the record label.	USSM19804780
6	Playing Time - Minutes	M	The number of minutes in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 005
7	Playing Time - Seconds	M	The number of seconds over the last full minute in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 52
8	Artist	M	The name of the artist performing the applicable recording	Beatles
9	Song Title	M	Title of work for which a License is requested	Yesterday
10	AKA Song Title	O	Other names by which the work is known	Over the Rainbow; Somewhere Over the Rainbow
11	ISWC Code	O	International Standard Musical Work Code. Code assigned to works by the network of ISO/ISWC Local or Regional agencies	Example: T-034.524.630-1 Data Entered: T0345246301
12	HFA Song Code	O	Identifier assigned by HFA to identify a work uniquely	Example: Y12345
13	Songwriter(s)	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of the composer(s) of the work.	Format: [First Name] [Last Name], [First Name], etc Example: Michael Ross, Tom Smith
14	Publisher Name	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of publisher owning a share of the work. Additional publishers should be listed on separate lines using the same manufacturer's request number assigned to the work.	EMI Mills
15	HFA Publisher Number	O	Identifier assigned by HFA to identify a publisher uniquely.	P12345
16	Publisher Share	O	Percent of song owned by publisher.	Example: 66.667% Data Entered: 066.6670

17	Catalog Number	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The catalog number of a prior physical product that has been previously licensed (where applicable.)	12345-2
18	Album (physical product) Title	C Provide either (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The title of a prior physical product that has been previously licensed (where applicable)	Parachute
19	UPC Code	C Provide either (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The UPC code of a prior physical product that has been previously licensed (where applicable).	706301594728
20	Configuration Code	M	Code designating configuration type(s) applicable. Numerous options available; most relevant are in example column.	CV = Use in Covered Services under this Agreement (includes LT, LU and S below) LT = Time-Limited Digital Phonorecord Delivery LU = Use Limited Digital Phonorecord Delivery S = On-Demand Streaming (Single) SA = On-Demand Streaming (Album) SP = Digital Phonorecord Delivery (Single) DP = Digital Phonorecord Delivery (Album) CD = Compact Disc CS = Cassette
21	License Type	M	Classification of license type requested.	G = Digital D = Physical Product (Domestic) I = Physical Product (Import)
22	Server Fixation Date	M	The date the applicable recording was or is expected to be fixed to the server for distribution via streaming or downloading.	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
23	Rate Code	C (one of the rate fields from 23 - 26 must be completed)	Code designating type of rate applicable. Numerous options available; most relevant are in example column.	T = Statutory rate to be determined under this Agreement R = Under controlled composition clause in contract where controlled rate applies S = Statutory (already determined)
24	Rate in Cents	C (one of the rate fields from 23 - 26 must be completed)	Rate indicated as a penny rate.	0.0755
25	Rate in Percentage of Statutory	C (one of the rate fields from 23 - 26 must be completed)	Rate indicated in percentage of statutory.	75



26	Rate in Percentage of Minimum Statutory	C (one of the rate fields from 23 - 26 must be completed)	Rate indicated in a percentage of minimum statutory.	75
27	HFA License Number	Output	Number assigned by HFA for each license	1010120001
28	HFA License Status Code #1	Input/Output	Input: Use to designate amended record - use code R in field Output: Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	Input: R - indicates this record has been amended and is being resubmitted Output: 03 = DUPLICATE LICENSE REQUEST (2ND PASS, ALREADY LICENSED, PART OF EDIT VALIDATION PROCESS)
29	HFA Flag for Amended Publisher Data	Output	Indicates that publisher information submitted by licensee differs on HFA database (for HFA represented publishers only)	Y = Flagged so that requestor can note that HFA publisher information differs from that submitted
30	Publisher Category Code	Output	Publisher Category Code.	blank = Opt In HFA Publisher N = Non-HFA Publisher D = Opt In HFA Publisher, licensing direct to Licensee (i.e., affiliated with Licensee) B = Opt Out HFA Publisher, or Song blocked by Publisher
31	Total HFA Represented Share	Output	Total % of work represented by HFA	Example: 66.667% Data Entered: 066.6670
32	HFA License Status Code #2	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	03 = DUPLICATE LICENSE REQUEST (2ND PASS, ALREADY LICENSED, PART OF EDIT VALIDATION PROCESS)
33	HFA License Status Code #3	Output	Code designating reason why request was not licensable as submitted. Numerous options available, with options being added/revised as necessary.	03 = DUPLICATE LICENSE REQUEST (2ND PASS, ALREADY LICENSED, PART OF EDIT VALIDATION PROCESS)
34	User Defined	Input/Output	This field is reserved for and defined by each record company. HFA will send back this information in the output file.	



## License Matching/ Edit Validation Status Codes

### **MATCHING MISCELLANEOUS**

- 01 NO MATCH FOUND (FOR OTHER THAN SPECIFICALLY LISTED STATUS CODES)
- 02 DUPLICATE LICENSE REQUEST (1<sup>ST</sup> PASS - PRELIMINARY SCAN; WITHIN THE CURRENT BATCH)
- 03 DUPLICATE LICENSE REQUEST (2<sup>ND</sup> PASS, ALREADY LICENSED, PART OF EDIT VALIDATION PROCESS)

### **RECORD MATCH**

- 10 SONG TITLE NOT FOUND
- 11 SONG TITLE MATCH ONLY, INSUFFICIENT FOR LICENSE
- 12 SONG TITLE AND ARTIST MATCH ONLY, INSUFFICIENT FOR LICENSE
- 13 SONG TITLE AND ALBUM MATCH ONLY, INSUFFICIENT FOR LICENSE
- 14 SONG TITLE AND CATALOG / UPC # MATCH ONLY, INSUFFICIENT FOR LICENSE

### **RECORD EDIT VALIDATION**

- 20 SONG TITLE AND SONG CODE GIVEN DO NOT MATCH
- 21 DUPLICATE LICENSE REQUEST NUMBER
- 22 INVALID ISRC CODE
- 23 INVALID UPC CODE
- 24 INVALID CONFIGURATION CODE
- 25 INVALID LICENSE TYPE
- 26 LICENSE TYPE AND CONFIGURATION CONFLICT
- 27 INVALID FIXATION DATE
- 28 INVALID RATE
- 29 NO RECORDED CONTROLLED COMPOSITION RATE RECORDED FOR PUBLISHER

### **MISSING MATCHING DATA ELEMENTS (INCLUDING MANDATORY AND CONDITIONAL FIELDS)**

- 40 MISSING MANDATORY FIELD - MANUFACTURER REQUEST NUMBER
- 41 MISSING MANDATORY FIELD - LABEL NAME
- 42 MISSING MANDATORY FIELD - ISRC CODE
- 43 MISSING MANDATORY FIELD - PLAYTIME
- 44 MISSING MANDATORY FIELD - ARTIST

- 45 MISSING MANDATORY FIELD - SONG TITLE
- 46 MISSING MANDATORY FIELD - CONFIGURATION CODE
- 47 MISSING MANDATORY FIELD - LICENSE TYPE
- 48 MISSING MANDATORY FIELD - SERVER FIXATION DATE
- 49 MISSING MANDATORY FIELD - RATE
- 50 MISSING CONDITIONAL FIELDS
- 51 MISSING IDENTIFIER - ISRC / CATALOG NUMBER / UPC

**PENDING SONG**

- 70 SONG INFORMATION SENT TO PUBLISHER FOR VERIFICATION
- 71 PUBLISHER DESIGNATED ON REQUEST DOES NOT CLAIM THIS SONG
- 72 PUBLISHER LICENSED DIRECTLY

**PUBLISHER EDIT VALIDATION**

- 81 PUBLISHER NOT REPRESENTED BY HARRY FOX AGENCY
- 82 PUBLISHER UNKNOWN
- 83 PUBLISHER DID NOT OPT-IN TO AGREEMENT
- 84 LICENSE REQUEST ON HOLD PENDING PUBLISHER APPROVAL
- 85 SONG OWNED BY LICENSEE'S PUBLISHING BRANCH; TO BE LICENSED DIRECT
- 86 SONG SPECIFIC BLOCK PER PUBLISHER'S INSTRUCTIONS
- 91 ORIGINAL VERSION OF SONG IS IN THE PUBLIC DOMAIN IN THE USA
- 92 PUBLISHER OWNERSHIP NOT YET VERIFIED
- 93 SONG PLACED ON HOLD FOR LICENSING BY PUBLISHER
- 94 SONG HAS RESTRICTIONS; REQUIRES PUBLISHER APPROVAL
- 95 OLD DERIVATIVE VERSION OF SONG, CURRENT PUBLISHER UNKNOWN
- 96 INVALID SONG CODE

### Data Access and Use Agreement

This Agreement, dated as of March 25, 2002, between The Harry Fox Agency, Inc., a New York corporation, having its principal place of business at 711 Third Avenue, New York, New York ("HFA") and **REDACTED**

WHEREAS, HFA possesses databases containing data pertaining to certain copyrighted musical works (collectively, the "HFA Database");

WHEREAS, the parties to this Agreement desire to form a relationship whereby Licensee accesses a particular subset of the HFA Database in order to facilitate licensing arrangements with HFA;

NOW THEREFORE, in consideration of these premises and the mutual promises, covenants and agreements contained in this Agreement, HFA and Licensee agree as follows:

#### SECTION 1: ADDITIONAL TERMS; DEFINITIONS

1.1 Definitions. As used in this Agreement, the following capitalized terms shall have the meanings given below:

"Affiliate" with respect to any person or entity, means and includes any person or entity controlling, controlled by or under common control with such person or entity.

"Confidential Information" means any and all HFA information intended to remain confidential relating to HFA's business and its databases, products, services, business strategies, designs, capabilities or business affairs, including, but not limited to, information, all data related to publisher-principals, concepts, methods, drawings, documents, proposals, specifications, data models, data integration tools and techniques, code, programs, as well as samples, specimens, copyright, patent and/or trademark applications or registrations, trade secrets, know-how, customers or prospective customers, customer lists, and any other proprietary information relating to HFA's businesses, and the development, testing, manufacture, creating and/or licensing of HFA's products and services. Confidential Information of HFA shall include the HFA Information (as defined below).

"HFA Information" means the portion of the HFA Database that is provided to Licensee by HFA in accordance with the terms hereunder.

"Internet Music Licensing Agreement" means the Agreement Concerning the Licensing of Certain Internet Music Subscription Services, dated as of the date hereof, by and between HFA and Licensee.

"Territory" means the United States and its territories.

"Term" has the meaning given to it in Section 6.1.

## SECTION 2: LICENSE GRANT

2.1 Grant. Subject to and in accordance with the terms of this Agreement, HFA grants Licensee a royalty-free, non-exclusive, non-transferable right and license for the duration of the Term, within the Territory, without the right to sublicense, to access and use the HFA Information solely as necessary to facilitate and administer licensing arrangements with HFA pursuant to the Internet Music Licensing Agreement. All rights not expressly granted under this Agreement are reserved by HFA.

### 2.2 Limitations.

(a) Licensee covenants that it shall not nor authorize any person or entity to use in any manner not expressly authorized hereunder, resell, further distribute or disclose the HFA Information, or any part thereof, without HFA's express written permission.

(b) Licensee covenants that it shall not systematically extract and/or copy, whether by bulk transfer or through individual data query and response, any elements of the HFA Information provided hereunder except if the sole purpose of such extraction and/or copying is to request or administer HFA licenses pursuant to the Internet Music Licensing Agreement.

(c) Licensee covenants that it shall not nor authorize any person or entity to use the HFA Information to engage in business activities in competition with HFA or for any purpose other than to request and administer licenses issued by HFA and Licensee shall not disclose the HFA Information to any third party.

(d) Licensee covenants that it shall not extract or copy any data from the HFA Information and/or incorporate such data (or extracted data) into its own or any third-party-owned database(s) except if the sole purpose of such database is to request or administer HFA licenses pursuant to the Internet Music Licensing Agreement.

(e) Licensee covenants that it shall not, for any purpose, intermingle, whether by bulk transfer or through individual data query and response, the HFA Information with, or incorporate the HFA Information into, its own or any third-party-owned database containing information other than the HFA Information except for the sole purpose of requesting or administering HFA licenses pursuant to the Internet Music Licensing Agreement.

## SECTION 3: INTELLECTUAL PROPERTY AND CONFIDENTIALITY

3.1 Intellectual Property. Licensee acknowledges and agrees that all

right, title and interest in and to the HFA Information and the HFA Database is and shall remain with HFA. HFA acknowledges that all, right, title and interest in and to the information provided by Licensee shall remain with Licensee, subject to HFA's right to use the information for the purpose of issuing and administering licenses under the Internet Music Licensing Agreement. HFA acknowledges and agrees that all right, title and interest in and to Licensee's proprietary information is and shall remain with Licensee.

(a) Licensee acknowledges that information originally created and maintained in the HFA Databases, regardless of form or format, is proprietary to HFA and comprises: (i) works of original authorship, including compiled information containing HFA's selection, arrangement and coordination and expression of such information or pre-existing material it has created, gathered or assembled; (ii) valuable confidential and trade secret information; and (iii) information that has been created, developed and maintained by HFA at great expense of time and money such that misappropriation or unauthorized use by others for commercial gain would unfairly and irreparably harm such party.

(b) Licensee shall not commit or permit any act or omission by its agents, employees or any third party or any user of Licensee's service that would impair HFA's proprietary and intellectual property rights in the HFA Information. Licensee agrees to notify its users of HFA's ownership of and copyright in the HFA Information.

(c) Licensee agrees to notify HFA immediately upon obtaining any information regarding a threatened or actual infringement of HFA's rights.

3.2 Confidentiality of Information. Licensee covenants that during the Term, it shall not disclose any Confidential Information to any third party; *provided, however,* that it may disclose (i) any Confidential Information that enters the public domain through no fault of Licensee; (ii) any Confidential Information that is independently derived or acquired from a party not subject to a duty of confidentiality to HFA; or (iii) any Confidential Information that is required to disclose pursuant to an order of a court of competent jurisdiction; *provided, however,* that in the event that a party is ordered to disclose any Confidential Information, it shall notify the other of such order and reasonably cooperate with HFA to contest such an order. In the event such contest fails, Licensee shall only disclose that portion of the Confidential Information required by such an order. In addition, each party covenants that after the Term, it shall neither use or disclose any Confidential Information except as provided in this Section 3.2.

#### SECTION 4: OPERATIONS

4.1 Access. HFA will provide Licensee access to its electronic licensing procedures and certain data relating thereto as provided in the Internet Music

Licensing Agreement.

4.2 Use Inspection Right. During the term and for a one (1) year period following termination, Licensee agrees to permit HFA to inspect, on a semi-annual basis, during regular business hours and upon reasonable prior notice, the point or points at which the HFA Information is used in Licensee's facilities and to furnish whatever assistance is reasonably necessary to permit HFA to determine Licensee's compliance with this Agreement.

**SECTION 5: REPRESENTATIONS AND WARRANTIES, COVENANTS AND INDEMNIFICATION**

5.1 Due Authorization. Each party represents and warrants that it has the right and power to enter into this Agreement, that this Agreement is duly authorized, executed and enforceable and that there is no outstanding contract, commitment or legal impediment which may limit, restrict or impair its ability to perform its obligations under this Agreement.

5.2 Disclaimer of Warranty. HFA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO THE HFA INFORMATION, INCLUDING, BUT NOT LIMITED TO, THE CORRECTNESS, COMPLETENESS, CURRENTNESS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE HFA INFORMATION OR OF THE MEDIA ON WHICH THE DATA IS PROVIDED AND SHALL NOT BE LIABLE TO THE LICENSEE FOR ANY LOSS OR INJURY ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY HFA'S NEGLIGENT ACTS OR OMISSIONS IN PROCURING, COMPILING, COLLECTING, INTERPRETING, REPORTING, COMMUNICATING OR DELIVERING THE HFA INFORMATION OR IN OTHERWISE PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT.

5.3 No HFA Liability. HFA WILL NOT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER SUCH LIABILITY ARISES FROM CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE AND WHETHER OR NOT A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

5.4 No Third-Party Liability. HFA shall not be liable to any third-party including, without any limitation, any user of Licensee's service, in contract, tort, or otherwise for any direct, indirect, incidental, or consequential loss or damage sustained by such party arising from the breach, negligent performance, or failure in performance by HFA or its officers, employees, or agents of the terms of this Agreement or otherwise arising from the delivery and use of the HFA Information.

## 5.5 Indemnification.

(a) Indemnity by Licensee. Licensee agrees to indemnify, defend and hold harmless HFA (and any of its respective officers, directors, employees, Affiliates, successors and assigns) from and against any liabilities, damages, judgments, assessments (including reasonable attorneys' fees ("Losses")) brought against HFA by a third party based upon, arising out of or due to, or otherwise in respect of: Licensee's breach of any of its representations, warranties, covenants or agreements set forth in this Agreement.

(b) Opportunity to Defend Third-Party Claims. Licensee may elect to compromise or defend, at its own expense and by its own counsel, any claim or the commencement (or threatened commencement) of a claim for indemnification hereunder (an "Asserted Liability") involving a claim by a third party; *provided, however,* that Licensee agrees in writing that it is obligated to indemnify HFA against such Asserted Liability. If Licensee elects to compromise or defend such Asserted Liability, it shall within thirty (30) days (or sooner, if the nature of the Asserted Liability so requires) notify HFA of its intent to do so, and HFA shall cooperate, at the expense of Licensee, in the compromise of, or defense against, such Asserted Liability. If Licensee elects not to compromise or defend the Asserted Liability, fails to notify HFA of its election as provided above or contests its obligation to indemnify under this Agreement, HFA may pay, compromise or defend such Asserted Liability at the expense of Licensee. Notwithstanding the foregoing, neither Licensee nor HFA may settle or compromise any such Asserted Liability over the objection of the other; *provided, however,* that consent to settlement or compromise shall not be unreasonably withheld. In any event, HFA and Licensee may participate, at their own expense, in the defense of such Asserted Liability.

## SECTION 6: TERM AND TERMINATION

6.1 Term. This Agreement shall become effective as of the date hereof and will continue for the term of the Internet Music Licensing Agreement (the "Term") unless otherwise terminated pursuant to the termination provisions of this Agreement.

6.2 Termination. The occurrence of the following events shall be deemed material breaches and defaults of this Agreement by HFA or Licensee (as the case may be):

(a) if either party breaches in any material respect any representation, warranty or agreement or any other material obligation in this Agreement, unless such breach or failure is fully cured no later than thirty (30) days from the date of written notice of such breach to such party;

(b) if Licensee uses or discloses the HFA Information in any manner not expressly permitted by this Agreement;



(c) to the extent permitted by applicable law, in the event of Licensee's dissolution or the liquidation of all of Licensee's assets, or the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization, by, for or against Licensee, or in the event of the appointment of a receiver or a trustee for all or a portion of its property, or in the event that Licensee shall make an assignment for the benefit of creditors or commit any act for, or in, bankruptcy or become insolvent;

(d) if, at the close of business of any two (2) days, separated by at least one (1) day, during any contiguous twenty-one (21) day period (such days including weekends and holidays);, Licensee's total current liabilities exceed its total current assets (including cash) as determined in accordance with generally accepted accounting principles; or

(e) termination of the Internet Music Licensing Agreement.

Upon the occurrence of any of the events described in the foregoing clauses (b), (c), (d) or (e) this Agreement shall, with no further action on the part of HFA, terminate (such termination shall be without prejudice to any rights or claims HFA may have at law, in equity or otherwise) and all rights granted under this Agreement shall immediately, with no further action on the part of HFA, forthwith revert to HFA. Upon the occurrence of any of the events described in the foregoing clause (a) and failure to cure as provided in clause (a), the non-breaching party shall have the option to terminate this Agreement upon written notice to the breaching party. In the event HFA terminates this Agreement pursuant to the foregoing clause (a) because of a breach caused by Licensee, such termination shall be without prejudice to any rights or claims HFA may have at law, in equity or otherwise and all rights granted under this Agreement shall immediately, with no further action on the part of HFA, revert to HFA (the "Termination").

6.3 Return of HFA Materials. Promptly following termination of this Agreement for any reason, Licensee shall irrevocably purge or destroy any and all copies of the HFA Information (including without limitation, any derivations or summaries of such information) from Licensee's databases and other systems or any systems under Licensee's direct or indirect control, if any, and any other media on which any HFA Information may have been provided, together with all copies thereof, and all other HFA Information in its possession, whether in printed or machine readable form and certify in writing to HFA of such destruction.

## SECTION 7: PROPRIETARY RIGHTS

7.1 HFA Rights. The parties acknowledge that, as between the parties, HFA owns all rights in and to the HFA Information, including all copyright, trade secrets, and all other intellectual property and proprietary rights embodied therein. HFA shall have the exclusive right, but no obligation, to pursue any possible infringement of any proprietary rights associated with the foregoing, in its sole discretion.

## SECTION 8: MISCELLANEOUS

8.1 Specific Performance. The parties acknowledge that breach of Sections 2, 3.2 or 6.3 would cause irreparable harm, the extent of which would be difficult to ascertain. Accordingly, they agree that, in addition to any other legal remedies to which a non-breaching party might be entitled, such party shall be entitled to obtain immediate injunctive relief in the event of a breach of the provisions of such Sections.

8.2 Notices. All notices and other communications shall be in writing and shall be deemed given when delivered personally, upon a receipt of a transmittal confirmation if sent by facsimile or like transmission, three (3) days after the date sent by Federal Express, Express Mail or similar overnight courier service or five (5) days after the date sent by first class U.S. mail to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number for a party as shall be specified by like notice):

if to HFA:

The Harry Fox Agency  
711 Third Avenue  
New York, New York 10017  
Attention: President  
Telephone: (212) 922-3260  
Facsimile: (212) 953-2471

with a copy to:

Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, New York 10019-6064  
Attention: Carey R. Ramos, Esq.  
Telephone: (212) 373-3240  
Facsimile: (212) 373-2380

if to Licensee:

**REDACTED**

with a copy to:

## REDACTED

8.3 Amendment. This Agreement may not be amended except by written instrument executed by HFA and Licensee.

8.4 Binding Agreement; Assignment. No assignment of this Agreement shall be made by either party without the prior written consent of either party, except that HFA may assign its rights and obligations under this Agreement to an Affiliate or by operation of law and either party may assign its rights under this Agreement, without the prior written consent of the other, to any successor in interest due to a merger or acquisition, or to any party who acquires all or substantially all of the assets of such party, provided such successor assumes in writing the obligations of this Agreement, provided further, that this Agreement may only be assigned in connection with an assignment of the Internet Music Licensing Agreement. The terms of this Agreement shall be binding upon and inure to the benefit of any successor or permitted assignee.

8.5 Headings. The headings of sections and paragraphs in this Agreement are included for convenience of reference only and shall not control the meaning or interpretation of any of the provisions of this Agreement.

8.6 Survival of Certain Provisions. Notwithstanding the termination or expiration of this Agreement, the provisions of Sections 1, 2.2, 3, 4.2, 5.2, 5.3, 5.4, 5.5, 6, 7 and 8 shall survive and continue and shall bind the parties and their legal representatives, successors and permitted assigns.

8.7 Waiver. The failure of either party at any time to require performance by the other party of any provision of this Agreement shall in no way affect the right to require such performance at any time thereafter, nor shall the waiver by either party of a breach of any provision of this Agreement be taken or held to be a waiver of any succeeding breach of such provision or as a waiver of the provision itself.

8.8 Severability. If any provision of this Agreement or the application of this Agreement to any person or circumstance shall be to any extent held invalid or unenforceable, the remainder of the Agreement, or the application of such provision to persons or circumstances as to which it is not held to be invalid or unenforceable, shall not be affected thereby, and each provision shall be valid and be enforced to the fullest extent permitted by law.

8.9 Force Majeure. Performance by either party under this Agreement (other than payments of any amounts due HFA under this Agreement) shall

be subject to and shall be excused to the extent that it shall be rendered impossible by reason of fire, flood, accident, storm, war, riot, government interference, rationing, allocation, embargo, export and import control, currency control, strike, walkout, subject to their being beyond the reasonable control of or mitigation by each party.

8.10 Entire Agreement. All references in this Agreement to Sections shall be deemed references to such parts of this Agreement, unless the context shall otherwise require. This Agreement contains the entire understanding of the parties and supersedes all previous verbal and written agreements on the subject of this Agreement.

8.11 Relationship of Parties. This Agreement does not create, and shall not be deemed to constitute, a partnership or joint venture between the parties and neither party nor any of its directors, officers, employees or agents shall, by virtue of the performance of their obligations under this Agreement, be deemed to be an employee of the other.

8.12 No Third-Party Beneficiaries. Nothing in this Agreement is intended to create any benefit, right or cause of action in or on behalf of any person or entity other than HFA or Licensee.

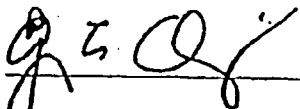
8.13 Controlling Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New as applied to contracts performed entirely within the State of New York.

8.14 Assistance of Counsel. Each party has been represented by counsel, who has reviewed this agreement and discussed the terms herein with his or her respective clients prior to execution.

8.15 Counterparts. The agreement may be executed in counterparts, each of which when so executed and delivered shall be an original, but both of such counterparts shall together constitute one and the same instrument.

8.16 Publicity. Except as may be required by applicable law, neither party shall issue a publicity release or announcement or otherwise make any public disclosure concerning this Agreement or the transactions contemplated by this Agreement, without prior approval of the other party, such approval not to be unreasonably withheld, and which shall not unreasonably delay the issuing of any such publicity release. If any announcement is required by law to be made by any such party, prior to making such announcement such party will deliver a draft of such announcement to the other party and shall give the other party an opportunity to comment.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of  
the Effective Date.

A handwritten signature in black ink, appearing to read 'G. L. Churgin', is written over a horizontal line.

Gary L. Churgin  
President and CEO, HFA

REDACTED

**EXHIBIT CO 0048**

## Agreement Concerning the Licensing of Certain Internet Music Subscription Services

This agreement (the "Agreement"), dated as of November 9, 2001 ("Effective Date"), is made by and between **Redacted**, a California corporation ("Licensee") and The Harry Fox Agency, Inc. ("HFA"), (the "Parties").

WHEREAS, Licensee desires to offer to consumers certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works available to consumers by licensing such services;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and Licensee may prefer to make business decisions concerning the launch of Covered Services (as defined below) with greater assurance concerning the legal status of such services;

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to Licensee and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of unresolved legal issues and to facilitate the expeditious launch of digital music services, the Parties have reached this Agreement with respect to terms pursuant to which Licensee may obtain licenses to make On-Demand Streams and Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(c)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Covered Services.** When Licensee seeks to use a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that are the subject matter of this Agreement in connection with the operation of its Covered Services, it may obtain through HFA on behalf of such HFA publisher-principal a mechanical license ("License") to make On-Demand Streams and Limited Downloads of the work through Covered Services, through to the end user, including by making server and related reproductions of the work used in the operation of Covered Services.

1.1. "Covered Service" means a service that offers (but the offerings of which are not necessarily limited to) On-Demand Streams and/or Limited Downloads of sound recordings of musical works from servers located within the United States (including the territories and possessions thereof), whether available from Licensee's web site ([www.listen.com](http://www.listen.com)) or from a third-party web site authorized by Licensee to distribute the service, where the basic charge to users for the service is a recurring subscription fee (in contrast to the basic charge being a per-download, per-play or per-song fee), including any use of such a service on a limited basis without charge to users in order to promote the subscription service.

1.2. "On-Demand Stream" means an on-demand, real-time digital transmission of a sound recording of a single musical work to allow a user to listen to a particular sound recording chosen by the user at a time chosen by the user, using streaming technology, which may include but is not limited to Real Audio or Windows Media Audio, that is configured by the provider of the Covered Service in a manner designed so that such transmission will not result in a substantially complete reproduction of a sound recording being made on a local storage device (e.g., the hard drive of the user's computer or a portable device) so that such reproduction is available for listening other than at substantially the time of the transmission.

1.3. "Limited Download" means a digital transmission of a time-limited or other use-limited download of a sound recording of a single musical work to a local storage device (e.g., the hard drive of the user's computer or a portable device), using technology designed to cause the downloaded file to be available for listening only either (1) during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) not to extend more than thirty (30) days beyond the expiration of the user's subscription, or (2) for a limited number of times not to exceed twelve (12) times after the expiration of the user's subscription.

1.4. Any HFA publisher-principal that grants a License and/or accepts a portion of an Advance Payment hereunder is referred to herein as a "Participating HFA Publisher." The term "Participating HFA Publisher" is limited to such entities and their majority-owned subsidiaries.

## **2. Covered Deliveries.**

2.1. A License with respect to a musical work includes all reproduction, distribution and DPD rights necessary for Covered Services to make On-Demand Streams and Limited Downloads of that work, from the making of server reproductions to the transmission and local storage of the On-Demand Streams or Limited Downloads. A License does not extend to other transmissions made by a Covered Service or to activities not encompassed by a mechanical license, including, without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to synchronize musical works with visual images resulting in audiovisual works, or karaoke rights, all of which rights are specifically reserved. The Parties agree that server reproductions made under a License to transmit On-Demand Streams or Limited Downloads may be used to make transmissions other than On-Demand Streams and Limited Downloads; provided that the foregoing is without prejudice to any applicable requirement, if any, that Licensee also obtain a license for such other transmissions made using such server reproductions. It is understood that this Agreement does not address or extend to any



performance rights that may be implicated by the making of On-Demand Streams or Limited Downloads through Covered Services.

2.2. A License includes the right to make, and there shall be no separate payment or accounting for, On-Demand Streams of Promotional Excerpts (as defined below) of sound recordings of musical works licensed hereunder used for promotional purposes, provided that the relevant copyright owner or copyright owners of such sound recordings has duly authorized the relevant copyright owner or copyright owners of such musical work (or an organization of copyright owners designated by such copyright owners as their common agent) have obtained authorization to make On-Demand Streams of Promotional Excerpts of that sound recording for the purpose of promoting that musical work without payment of any royalty. "Promotional Excerpt" is defined as a stream consisting of no more than thirty (30) seconds of playing time of the sound recording of a musical work, or in the case of sound recordings with a playing time of more than five minutes, a stream that is of no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of the sound recording of the musical work.

### 3. Licensing Process.

3.1. Commencing on the Effective Date, Licensee may submit License requests in electronic form, either individually or batched, and either for On-Demand Streams and/or Limited Downloads alone or in combination with other configurations, substantially in accordance with Exhibit A. Promptly after the Effective Date, the Parties shall arrange discussions between appropriate personnel of HFA and Licensee concerning electronic licensing procedures, with the goal of refining and testing HFA's electronic licensing procedures so that they can be used readily for the issuance of mechanical licenses expeditiously and with the goal of enhancing such procedures so that they later can be used readily by Licensee to request and obtain mechanical licenses for all configurations for which it desires licenses in a single request. In addition, Licensee may submit License requests by other means generally accepted by HFA, including but not limited to HFA's new web-based licensing system (when it becomes available), and HFA's standard paper form (but only using paper forms for complex License requests (e.g., requests involving medleys or samples), in limited numbers during times when electronic licensing capabilities are unavailable, or at other times in numbers that are generally consistent with Licensee's past use, if any, of paper forms and in any case in numbers that do not exceed what HFA can reasonably be expected to process under the circumstances). HFA may modify its license request and license forms from time to time, provided that it gives reasonable notice thereof to Licensee and such modifications do not unreasonably affect the ability of Licensee to submit license requests and obtain licenses. License forms may be issued electronically or in paper form, but when Licensee submits a License request in electronic form in accordance with this Section 3.1, HFA shall, promptly after processing the License request, return to Licensee an electronic file substantially in accordance with Exhibit A, with (1) the addition of that information indicated in Exhibit A as being "output" fields, (2) the addition of information, other than individual publisher share information, to complete any blank optional fields in the request, to the extent that such information is available in HFA's databases and is matched to the request in the License issuance process, (3) the substitution of information concerning HFA publisher-principal names where such information in HFA's databases is different from that in the request, and (4) the aggregated share of Participating HFA Publishers. If Licensee submits a License request in accordance with this Section 3.1 but the request contains insufficient information for HFA to find a match for the relevant work in its databases, HFA will work with Licensee to

provide the information necessary to enable a License to be issued, and if Licensee resubmits such request with the necessary information and the License can be issued, the provisions of Section 3.4 shall apply from the date of the original request. The Parties acknowledge the importance to HFA and music publishers of having License requests submitted promptly, and the importance to Licensee of having License forms issued promptly. The Parties shall cooperate in good faith to promote each of those goals.

3.2. The authority of HFA to license any individual musical work on behalf of its publisher-principals is subject to the approval of the relevant publisher-principal. HFA shall not require its publisher principals to opt in to this Agreement either before or after commencing to issue Licenses; HFA established an opt out period before commencing to issue Licenses, which period ends November 16, 2001. If an HFA publisher-principal at any time requests that HFA not issue Licenses on its behalf (either with respect to particular musical works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a License issued prior to such request. Through December 31, 2002, HFA shall notify Licensee quarterly of HFA publisher principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement.

3.3. HFA shall issue mechanical licenses for DPD configurations (including but not limited to Licenses under this Agreement) with respect to a musical work in its entirety if one or more of its publisher-principals owns or controls a partial interest in such musical work, even if other co-owners of such musical work are not HFA publisher-principals, except that, pursuant to Section 3.2, if all the HFA publisher-principals that own or control a partial interest in such work request that HFA not issue mechanical licenses on their behalf, HFA will not issue such licenses. In the case of a mechanical license issued as described in this Section 3.3, Licensee shall pay directly to each co-owner that is not an HFA publisher-principal (or such co-owner's authorized payee) such co-owner's share of the applicable royalty payments under Section 6.1.

3.4. License forms issued by HFA pursuant to this Agreement shall be retroactive to the date of the License request made by Licensee on or after the Effective Date in accordance with Section 3.1. To the extent that Licensee makes On-Demand Streams and Limited Downloads of musical works pending the processing by HFA of license forms in response to proper License requests submitted on or after the Effective Date in accordance with Section 3.1, HFA shall not directly or indirectly file, encourage, aid, support, finance, contribute to, promote, or participate in any claim, suit, action or proceeding asserting that such activities are infringing.

3.5. Subject to Section 3.3, HFA shall also accept License requests to make On-Demand Streams and Limited Downloads through Covered Services of musical works as to which no HFA publisher-principal has any ownership interest or control, in whole or in part, and for which a License is not otherwise available under this Agreement. In such a case, HFA shall use commercially reasonable efforts to secure the requested Licenses from the relevant non-HFA publisher-principals on the same terms as apply to HFA publisher-principals under this Agreement. (Non-HFA publisher-principals who grant Licenses through this arrangement shall be referred to as "Participating Independent Publishers".) In addition to any commission charged to the Participating Independent Publisher, HFA may charge Licensee a one-time administrative fee of: **Redacted** for each publisher that agrees to become a Participating Independent Publisher (it being understood that no such administrative fee shall be payable for any subsequent Licenses issued on behalf of that Participating Independent Publisher to

Licensee), unless the Participating Independent Publisher also authorizes HFA to grant mechanical licenses other than Licenses under this Agreement, in which case no such fee shall apply. The Advance Payment described in Article 4 may be applied to such administrative fee when payable by Licensee, and HFA shall provide to Licensee or an independent accounting firm designated by Licensee sufficient information concerning liability for such administrative fee to allow reconciliation of the Advance Payments as described in Section 4.4. When HFA arranges Licenses from Participating Independent Publishers pursuant to this Section 3.5, HFA shall collect and distribute mechanical royalties to such Participating Independent Publisher (or other authorized payees) unless Licensee requests to make such payments directly.

3.6. HFA and Licensee shall enter into a Data Access and Use Agreement, in the form attached hereto as Exhibit B.

3.7. Nothing in this Agreement, including but not limited to the availability of Licenses or the procedures for obtaining the same, shall preclude Licensee from at any time serving or filing a notice of intention to obtain a compulsory license in accordance with applicable law or, other than in Article 8, imply that any notice of intention so served or filed is valid or invalid. Nothing in this Agreement shall preclude Licensee from seeking, or HFA or any of its publisher-principals from granting, direct licenses to Licensee, including without limitation for use of musical works on the Covered Services, on whatever terms might be agreed upon between the relevant parties.

#### 4. Advance Payment.

4.1. Licensee shall pay to HFA a non-refundable advance royalty payment equal to **Redacted** multiplied by the Percent Market Share of the Participating HFA Publishers (the "Advance Payment"). "Percent Market Share" shall be calculated by dividing (a) the total royalties distributed to all Participating HFA Publishers during the calendar years 1999 and 2000 by (b) the total royalties distributed by HFA to all HFA publisher-principals during the calendar years 1999 and 2000. Licensee shall pay the Advance Payment as follows: Within ten (10) days after the Effective Date, Licensee shall pay to HFA **Redacted**. Within ten (10) days after the expiration of the opt-out period referenced in Section 3.2, HFA shall notify Licensee of the percentage of the U.S. publishing market-share that is represented by Participating HFA Publishers, according to its best available information. Within ten (10) days of receiving such notice from HFA, Licensee shall pay to HFA one-hundred percent (100%) of any remaining balance of the Advanced Payment owed to HFA. If, by the second anniversary of the Effective Date, there has then been no final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, then, subject to Section 4.2, until such a determination, Licensee shall each month pay to HFA a total supplementary Advance Payment of **Redacted** multiplied by the Percent Market Shares of the Participating HFA Publishers (calculated as described above).

4.2. Effective at the second anniversary of the Effective Date or any time thereafter, Licensee may terminate this Agreement upon thirty (30) days advance written notice to HFA. In the event Licensee does so, all Licenses previously issued under this Agreement shall terminate at the same time as this Agreement, without prejudice to the right of Licensee

thereafter to obtain new licenses under 17 U.S.C. § 115. In the case of termination by Licensee (a) payments shall be due in accordance with Section 6.1 for activities under this Agreement prior to the termination of the relevant Licenses, (b) Advance Payments may be applied against such payments in accordance with Section 4.4, and (c) to the extent remaining, Advance Payments also may be applied to royalties due under new licenses for On-Demand Streams and Limited Downloads made through Covered Services, which licenses are issued by HFA at least one year after the relevant date of termination of Licensee's Licenses. In addition to the foregoing, if there is a decision of the U.S. Copyright Office or a court, or any new legislation, inconsistent with Section 8.1, with the result that mechanical royalties are not required to be paid for some or all On-Demand Streams and/or Limited Downloads made through Covered Services, then the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be reduced to take into account such decision or legislation, based on actual usage under this Agreement to date, with the exact amount of such reduction to be agreed upon by the Parties promptly after such decision or legislation; provided that if any such decision is appealed and finally reversed on appeal, the amount of Licensee's monthly supplementary Advance Payments under Section 4.1 shall be restored, and Licensee shall promptly pay to HFA the total amount by which the supplementary Advance Payment was reduced in the interim.

4.3. HFA shall deposit Advance Payments into an interest-bearing bank account (with such interest being treated as part of the Advance Payment). HFA shall be free to distribute the initial and supplementary Advance Payments to HFA publisher-principals in accordance with a reasonable and nondiscriminatory methodology based on market share, actual usage or a per musical work payment (which methodology HFA shall provide to Licensee), as well as to any Participating Independent Publishers pursuant to Section 3.5. Except insofar as it is recouped pursuant to Sections 4.4 and/or 4.5, the Advance Payment shall be nonrefundable.

4.4. Upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, the total amount of Advance Payments (including interest) shall be applied against undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Licensee under this Agreement. Such Advance Payments shall be applied to the account of Licensee. If the Advance Payments are not fully recouped at such time, any remainder of the Advance Payments thereafter shall be applied against all undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Licensee under mechanical licenses issued by HFA for On-Demand Streams and Limited Downloads made through Covered Services (including but not limited to Licenses under this Agreement), until such amount is fully recouped.

4.5. At the request of HFA, with Licensee's written consent, which consent shall not be withheld unreasonably, Advance Payments may be applied to other undisputed amounts (e.g., other mechanical royalties) owed by Licensee to HFA on behalf of its publisher-principals.

5. **Royalty.** The royalty rate payable under a License shall be determined through negotiation and/or a CARP proceeding. The applicable rate will be structured as determined through negotiation or by the CARP, and may comprise separate royalty rate components for distinct uses of the musical work authorized by the License. The Parties shall meet to negotiate royalty rates in good faith. HFA reserves its right to seek interest as a part of such royalty rate determination. Licensee reserves its right to seek to have such royalty rate determination reflect

any payments under foreign copyrights in the case where On-Demand Streams or Limited Downloads are transmitted to users outside of the United States. Whether royalty rates are determined by negotiation or a CARP, and regardless of how royalty rate categories may be denominated, the Parties shall seek a determination of royalty rates such that it is clear which royalty rates are applicable to each of On-Demand Streams and Limited Downloads.

#### 6. Accounting and Payment.

6.1. Beginning with the issuance of a License, Licensee will be required to account to HFA on a quarterly basis for activity under such License, 45 days after the close of each quarter, providing information comparable to that presently provided by major record labels for physical products, and specifically including the number of On-Demand Streams and Limited Downloads of each work made during such quarter. Without limitation, quarterly reports shall include a breakdown of On-Demand Streams and Limited Downloads made by Covered Services under Licenses in the applicable quarter, by musical work and delivery method code (indicating On Demand-Streams and/or Limited Downloads), and including ISRC number if available, catalog number if available and HFA license number if available (in the same manner indicated by Licensee in its License request), and shall identify the specific Covered Services in which such On-Demand Streams and Limited Downloads were made. Licensee shall preserve all usage and financial data that reasonably should be expected to be relevant, upon the determination of royalty rates, to the calculation of royalties hereunder and use commercially reasonable efforts to do so for each Covered Service it operates hereunder. Subject to Article 4 and Section 3.3, upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, Licensee shall make the applicable payment for all previous quarters then completed, from the launch of the applicable Covered Services to date, within 45 days, to be accompanied by a cumulative statement setting forth and aggregating the information provided in the previous quarterly reports supplied under this Agreement. Thereafter, on a quarterly basis, 45 days after the close of each quarter, Licensee shall account to HFA for activities and/or revenues realized on such activities during such quarter as determined through negotiation and/or by regulation, providing such information as is required by regulation, a CARP, and/or a negotiated rate agreement, and, subject to Article 4 and Section 3.3, pay royalties at the applicable rate. Notwithstanding the foregoing, HFA reserves its right to seek more frequent access, including without limitation real-time access, to usage information.

6.2. At the request of HFA, Licensee shall accompany its quarterly reports with any available data in addition to that described in Section 6.1 concerning the numbers of On-Demand Streams and Limited Downloads made through Covered Services operated by Licensee (but not any personally identifying information), which data is regularly gathered or compiled by Licensee or provided to Licensee by its licensees with the legal right to disclose such data to HFA hereunder; provided that Licensee may provide any such data to HFA in whatever form it is available to Licensee in the ordinary course of its business and subject to any applicable confidentiality and other contractual use restrictions; and provided further that, before making any such request, HFA shall review with Licensee the types of such data Licensee has and can disclose to HFA, and the form in which such data is available, and HFA shall not request, and Licensee shall not be required to provide, data that (given the volume and form of such data, the degree to which such data is reflected in quarterly reports, the data processing capabilities of HFA and Licensee, HFA's intentions to use such information, and other relevant

factors) would not be commercially reasonable to provide. In addition, to the extent such information is available to Licensee and can be disclosed to HFA hereunder, at the request of HFA, Licensee shall accompany its quarterly reports with the total number of subscribers to and total number of subscriber months for each Covered Service operated by Licensee during the reporting period; provided that any such information relating to a Covered Service operated by Licensee shall be subject to an appropriate confidentiality restriction, and any such information provided to Licensee by a third party shall be subject to any applicable confidentiality and other contractual use restrictions.

7. **Term.** The term of this Agreement shall commence on the Effective Date and, subject to Sections 4.2 and 8.5, continue until the final non-appealable determination of royalty rates for each of On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding. New Licenses shall continue to be issued pursuant to this Agreement for the duration of such term. Thereafter, Licensee may request, and HFA shall issue, mechanical licenses covering On-Demand Streams and Limited Downloads at the applicable royalty rates in accordance with its customary practices for the issuance of licenses where there is an applicable statutory rate, which the Parties currently understand to include the means of application described in Section 3.1. Notwithstanding the foregoing, Licenses once issued under this arrangement shall remain in effect unless terminated for default in respect to payment (once royalty rates are determined) or accounting (either before or after royalty rates are determined) pursuant to 17 U.S.C. § 115(c)(6) (or other applicable provision of law, if any), it being understood that a License may not be terminated for such a default where the default is remedied as provided in 17 U.S.C. § 115(c)(6). In addition, the provisions of Sections 4.2, 4.4 and 4.5, and of Articles 6 and 7, shall survive the expiration or termination of this Agreement or any License under this Agreement.

8. **Legal Framework for Agreement.**

8.1. Subject to the other provisions of this Article 8, in order to avoid litigation and to provide assurance to Licensee in connection with the launch of its digital music services and enable HFA's issuance of license forms for Covered Services hereunder:

(a) The Parties agree that under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act. The Parties further agree that under current law the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of a DPD, and thus does not require a mechanical license. The foregoing does not express or imply any agreement that, and shall not be used to support any argument that, the process of making On-Demand Streams other than through Covered Services, or the process of making streams that would not qualify for a statutory license under Section 114(d)(2) of the Copyright Act (including, without limitation, because such streams are part of an "interactive service" (as that term is defined in Section 114(j)(7)) or exceed the "sound recording performance complement" (as that term is defined in Section

114(j)(13)) does or does not involve the making and distribution of a DPD, and the Parties expressly reserve all their rights with respect to that issue.

(b) The Parties agree that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

(c) The Parties agree that under current law a compulsory license to make On-Demand Streams and Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the On-Demand Streams and Limited Downloads) is available under Section 115 of the Copyright Act.

8.2. Subject to Sections 8.3 and 8.5, for the term of this Agreement, no Party and no Participating HFA Publisher shall take a position contrary to or inconsistent with the agreements in Section 8.1 as to current law, or lend support or resources, financial or otherwise, to any other person or entity taking a contrary or inconsistent position, before the Copyright Office, a CARP, a court or any other government office or tribunal. Thereafter, no Party and no Participating HFA Publisher shall commence or lend support to any action in court to challenge the validity of the rates determined pursuant to Article 5 on the ground that On-Demand Streams and Limited Downloads do not involve the making or distribution of DPDs. It is understood that, for purposes of this Section 8.2, Licensee or Participating HFA Publishers shall not be deemed to lend financial support or resources to affiliated entities merely through intra-enterprise financial arrangements in the ordinary course of business or merely by paying membership dues or fees that a trade association ordinarily requires of its members or by merely sitting on the board of directors of a trade association.

8.3. Notwithstanding Sections 8.1 and 8.2, the Parties and Participating HFA Publishers may at any time (1) raise and litigate (including, without limitation, before a CARP) the economic value of, and the appropriate royalty rates to be applied to, On-Demand Streams and Limited Downloads; (2) take or support any position they choose with respect to sound recordings (as distinguished from any musical works embodied therein) and the rights therein, including, without limitation, rights under Sections 106 and 114 of the Copyright Act, and (3) make or lend support to any arguments they choose to prosecute, or defend or counterclaim against, an infringement claim relating to activities before the Effective Date. Notwithstanding Sections 8.1 and 8.2, Licensee may at any time make or lend support to any arguments they choose to defend or counterclaim against an infringement claim relating to activities on or after the Effective Date, in the event that a License with respect to the relevant works is not available hereunder (it being understood that, subject to Section 8.4, HFA and Participating HFA Publishers may participate in the litigation of any such claim, so long as their doing so is consistent with Sections 8.1 and 8.2). The Parties agree that they will act in good faith not to induce, promote or encourage the litigation of an infringement claim relating to activities as described in the immediately preceding sentence.

8.4. To the extent that an action being litigated by Licensee involves the question of the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c) for a musical work for which a License is not available under this Agreement, HFA shall not participate in or lend support to such action. The Parties agree that they will act in good faith not to induce, promote or encourage litigation concerning the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c). For purposes of this Article 8, HFA shall include its parent National Music Publishers' Association, Inc.

8.5. To the extent that a final, non-appealable decision of the Copyright Office or a court, or any new legislation, is inconsistent with Section 8.1, this Agreement shall be inapplicable to the extent of the inconsistency as of the date thereof, but subject to Article 4, Licensee shall not be entitled to a refund of any monies paid prior to such date.

8.6. Nothing in this Article 8 shall be used by, or be enforceable by, a third party not a Party to this Agreement, in any manner or in any context, including without limitation in any legal proceeding. This Agreement does not give rise to any third party beneficiary rights in any party other than Participating HFA Publishers. The agreements set forth in this Article 8 and the course of dealing hereunder shall be inadmissible, and shall not be used to support any argument of law, in any litigation or arbitration relating to (1) activities before the Effective Date or (2) activities other than making and distributing On Demand Streams and Limited Downloads through Covered Services, except making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act.

#### 9. Security.

9.1. The Covered Services shall prevent by means of software functional limitations: (i) the re-transmission of a sound recording embodying a licensed work from a user's personal computer; and (ii) the creation by any means of an individual sound recording file or collection of sound recording files embodying the licensed works that are playable without an active simultaneous connection with the Listen.com website. For clarification, the term "re-transmission" does not include the rendering by a user's personal computer of the sound recording embodying licensed works into audio for the purpose of such user's immediate perception.

9.2. Licensee shall incorporate, as part of the distribution of sound recordings embodying licensed works to users pursuant to this Agreement, a security technology, including, but not limited to, use of a digital rights management technology, for existing and prospective users that only permits transmission to an end user in a secure manner (e.g., so as to prevent illicit copying). In the event of a breach of such security technology, licensee shall use its reasonable best efforts to devise a solution to such security breach in order to continue the operation of the Covered Services and shall keep HFA reasonably informed as to the status thereof. Any tracking security technology employed by Licensee shall be compatible with similar tracking technology to the extent employed by HFA and shall be capable of communicating with such HFA tracking technology.

9.3. Licensee shall not edit, alter or defeat any copyright protection technology or mechanism embedded in or associated with the sound recordings embodying the licensed works.



9.4. To the extent the Covered Services use third-party technology in order to operate, Licensee shall use its reasonable best efforts to maintain and upgrade such technology by diligently monitoring any third-party announcement made available to Licensee of bug-fixes, security holes and functionality improvements, obtaining such upgrades, and installing and distributing such upgrades as necessary to maintain the integrity of the Covered Services.

9.5. Licensee shall use its reasonable best efforts to prevent the creation of any unauthorized copies of any licensed works in any facilities in its control in any form (including but not limited to, copies created by employees or contractors outside the immediate scope of their employment), and shall use its commercially reasonable efforts to prevent the creation of such unauthorized copies by any users. If Licensee learns of any circumvention described in Section 9.2 above or of any unauthorized manufacture, advertising, distribution, lease or sale of the licensed works (any of the foregoing an "Unauthorized Use"). Licensee shall promptly provide HFA with written notification of such Unauthorized Use and take all reasonable steps, and reasonably cooperate with HFA, to prevent such Unauthorized Use. Without limiting any other rights and remedies of HFA and its Licensors, if HFA learns, and provides Licensee with reasonably credible evidence, that there are widespread, significant and substantial Unauthorized Uses, upon forty-five (45) days' notice by HFA, Licensee must, unless it eliminates such Unauthorized Uses to the satisfaction of HFA within the forty-five (45) day period, suspend all On-Demand Streams or Limited Downloads of the licensed works under this Agreement pending Licensee's elimination of such Unauthorized Uses to the satisfaction of HFA. Licensee will, on a quarterly basis, inform HFA of all known breaches or attempted breaches of its security measures and Licensee's response to each of those breaches or attempted breaches.

10. Electronic Reporting. The Parties agree to work together in good faith to implement means whereby accounting information relating to Licenses will be provided to HFA in electronic, machine-readable form.

11. Publicity. Licensee and HFA will issue a joint press release announcing this arrangement. In HFA's communications to its members concerning this Agreement, it shall recommend that HFA members and HFA publisher-principals avail themselves of this Agreement.

12. Miscellaneous.

12.1. Assignment. This Agreement shall be binding upon and inure to the benefit of all of the parties and their respective permitted successors and permitted assigns. Any assignment or transfer by Licensee of any of its rights or licenses under this Agreement shall require the prior written consent of HFA, provided however, that notwithstanding the foregoing, Licensee may assign its rights and licenses under this Agreement, without the prior written consent of HFA, to any successor in interest due to a merger or acquisition, or to any party who acquires all or substantially all of the assets of Licensee, provided such successor assumes in writing the obligations of Licensee under this Agreement.

12.2. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to conflicts of law principles thereof).

12.3. Amendment. This Agreement may be modified or amended only by a writing signed by each of the Parties.

12.4. Entire Agreement. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.


12.5. Counterparts. This Agreement may be executed in counterparts, including by means of facsimile, each of which shall be deemed to be an original, but which taken together shall constitute one agreement.

12.6. Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

11709701 PRI 18-25 FAX 212-822-3298 NATIONAL MUSIC

0003

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the  
Effective Date:

  
Jerry Thurgin  
President and CEO, HRA

Redacted

Redacted

Nov 09 01 05:48p

P.1

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date

Gary Churgin  
President and CEO, HFA

Redacted



## EXHIBIT A

- I. HFA/Licensee Electronic License Request
- II. & Output File Layout: Field Explanations

	Field	Type	Explanation	Example
1	Manufacturer Number	M	Account number assigned by HFA to Licensee	M12345
2	Transaction Date	M	Date electronic license request submitted to HFA	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
3	Manufacturer Request Number	M	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested	12345678
4	Label Name	M	The name of the record label that produced the applicable recording	Epic
5	ISRC Code	M	International Standard Recording Code. ISRC code assigned to the recording by the record label.	USSM19804780
6	Playing Time - Minutes	M	The number of minutes in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 005
7	Playing Time - Seconds	M	The number of seconds over the last full minute in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 52
8	Artist	M	The name of the artist performing the applicable recording	John Lennon, Paul McCartney
9	Song Title	M	Title of work for which a License is requested	Yesterday
10	A/K/A Song Title	O	Other names by which the work is known	Over the Rainbow; Somewhere Over the Rainbow

1 1	<b>ISWC Code</b>	O	International Standard Musical Work Code. Code assigned to works by the network of ISO/ISWC Local or Regional agencies	Example: T-034.524.680-1 Data Entered: T0345246801
1 2	<b>HFA Song Code</b>	O	Identifier assigned by HFA to identify a work uniquely	Example: P12345
1 3	<b>Songwriter(s)</b>	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of the composer(s) of the work.	Format: [First Name] [Last Name], [First Name], etc Example: Michael Ross, Tom Smith
1 4	<b>Publisher Name</b>	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	Name of publisher owning a share of the work. Additional publishers should be listed on separate lines using the same manufacturer's request number assigned to the work.	EMI Mills
1 5	<b>HFA Publisher Number</b>	O	Identifier assigned by HFA to identify a publisher uniquely.	P12345
1 6	<b>Publisher Share</b>	O	Percent of song owned by publisher.	Example: 66.667% Data Entered: 066.6670
1 7	<b>Catalog Number</b>	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The catalog number of a prior physical product that has been previously licensed (where applicable.)	12345-2
1 8	<b>Album (physical product) Title</b>	C Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	The title of a prior physical product that has been previously licensed (where applicable)	Parachute
1	<b>UPC Code</b>	C	The UPC code of a prior physical	706301594728

9		Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC	product that has been previously licensed (where applicable).		
2 0	Configuration Code	M	Code designating configuration type(s) applicable. Numerous options available; most relevant are in example column.	CV	Use in Covered Services under this Agreement (includes LT, LU and S below)
					Time-Limited Digital Phonorecord Delivery
				LU	Use Limited Digital Phonorecord Delivery
					On-Demand Streaming (Single)
				SR	Digital Phonorecord Delivery (Single)
2 1	License Type	M	Classification of license type requested. Numerous options available; most relevant is in example column.	D	Digital
2 2	Server Fixation Date	M	The date the applicable recording was or is expected to be fixed to the server for distribution via streaming or downloading.	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304	
2 3	Rate Code	C <i>(one of the rate fields from 23 - 26 must be completed)</i>	Code designating type of rate applicable. Numerous options available; most relevant are in example column.	T	Statutory rate to be determined under this Agreement
				R	Under controlled composition clause in contract where controlled rate applies
				S	Statutory (already determined)
2 4	Rate in Cents	C <i>(one of the rate fields from 23 - 26 must be completed)</i>	Rate indicated as a penny rate.	.0755000	

2 5	Rate In Percentage of Statutory	C (one of the rate fields from 23 – 26 must be completed)	Rate indicated in percentage of statutory.	075.00	
2 6	Rate in Percentage of Minimum Statutory	C (one of the rate fields from 23 – 26 must be completed)	Rate indicated in a percentage of minimum statutory.	075.00	
2 7	HFA License Number	Output	Number assigned by HFA for each license	1010120001	
2 8	HFA License Reject Code	Output	Code designating reason why request was not licensable as submitted. Numerous options available; most relevant are in example column.	01	NO MATCH FOUND (FOR OTHER THAN SPECIFICALLY LISTED REJECT CODES)
				02	DUPLICATE LICENSE REQUEST (1ST PASS - PRELIMINARY SCAN; WITHIN THE CURRENT BATCH)
				03	DUPLICATE LICENSE REQUEST (2ND PASS, ALREADY LICENSED, PART OF EDIT/VALIDATION PROCESS)
				10	SONG TITLE NOT FOUND
				11	SONG TITLE MATCH ONLY, INSUFFICIENT FOR LICENSE
				12	SONG TITLE AND ARTIST MATCH ONLY, INSUFFICIENT FOR LICENSE
				13	SONG TITLE AND ALBUM MATCH ONLY, INSUFFICIENT FOR LICENSE
				14	SONG TITLE AND CATALOG / UPC # MATCH ONLY, INSUFFICIENT FOR LICENSE
				21	CONTROLLED RATE REQUEST COULD NOT BE MATCHED TO PREVIOUSLY
				81	PUBLISHER NOT REPRESENTED BY HARRY FOX AGENCY
				82	PUBLISHER UNKNOWN
				83	PUBLISHER OPTED OUT OF AGREEMENT
				91	ORIGINAL VERSION OF SONG IS IN THE PUBLIC DOMAIN IN THE USA

- 17 -



				92	PUBLISHER OWNERSHIP NOT YET VERIFIED
				93	SONG PLACED ON HOLD FOR LICENSING BY PUBLISHER
				94	SONG HAS RESTRICTIONS; REQUIRES PUBLISHER APPROVAL
				95	OLD DERIVATIVE VERSION OF SONG, CURRENT PUBLISHER UNKNOWN
				96	INVALID SONG CODE
2 9	HFA Flag for Amended Publisher Data	Output	Indicates that publisher information submitted by licensee differs on HFA database (for HFA represented publishers only)	Y	Flagged so that requestor can note that HFA publisher information differs from that submitted



## HFA Electronic License Request & Output File Layout

### Acceptable Data Formats:

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
3	Manufacturer Request Number	N	8	0	M
4	Label Name	A	15		M
5	ISRC Code	A	15		M
6	Playing Time - Minutes	N	3	0	M
7	Playing Time - Seconds	N	2	0	M
8	Artist	A	200		M
9	Song Title	A	200		M
10	A/K/A Song Title	A	200		O
11	ISWC Code	A	11		O
12	HFA Song Code	A	6		O
13	Song Writer(s)	A	200		C*
14	Publisher Name	A	60		C*
15	HFA Publisher Number	A	6		O
16	Publisher Share	N	7	4	O
17	Catalog Number	A	15		C*
18	Album (physical product) Title	A	200		C*
19	UPC Code	A	16		C*
20	Configuration Code	A	2		M
21	License Type	A	1		M
22	Server Fixation Date	N	8	0	M
23	Rate Code	A	1		C**
24	Rate in Cents	N	7	7	C**
25	Rate in Percentage of Statutory	N	5	2	C**
26	Rate in Percentage of Minimum Statutory	N	5	2	C**
27	HFA License Number	N	10		Output
28	HFA License Reject Code	A	2		Output
29	HFA Flag for Amended Publisher Data	A	1		Output

### KEY: TYPE:

A = Alphanumeric Field

**N = Numeric Field**

**LENGTH:** For Alphanumeric fields, it is the maximum number of characters required.  
For Numeric fields, it is the exact number of characters required

**DECIMAL:** Number of characters after decimal (for numeric fields only)

**INPUT OPTION:**

**M = Mandatory**

**O = Optional**

**C\* = Conditional** — As agreed, label must provide either: (a) Songwriter or (b) Publisher, Catalog Number, Album Title and UPC. If (a) is provided, then (b) is not required; and vice versa.

**C\*\* = Conditional** — One of the rate code fields from 23-26 must be completed

EXHIBIT B

FORM OF DATA ACCESS AND USE AGREEMENT

[TO COME]

**EXHIBIT CO 0049**

## GOVERNING AGREEMENT

This Agreement ("Agreement") is being entered into as of September 21, 2001 (the "Effective Date"), by and between REDACTED, having its principal place of business at REDACTED, and The Harry Fox Agency, Inc., having its principal place of business at 711 Third Avenue New York, New York ("HFA"). Certain terms used in this Agreement have the meanings assigned to them in Section 1.

WHEREAS, REDACTED owns and operates the Redacted Services which, among other things, provide subscription-based, on-demand streaming music services;

WHEREAS, REDACTED desires to obtain a non-exclusive, non-transferable, royalty-bearing license, without the right to sublicense, covering use of new and existing Works owned or controlled by various HFA publisher-principals (the "HFA Publisher Principals"), in order to distribute Sound Recordings embodying the Works through its REDACTED Services to such service's registered subscribers; and

WHEREAS, HFA, on behalf of certain of the HFA Publisher-Principals, wishes to license REDACTED to use the Works solely in connection with its REDACTED Services;

NOW, THEREFORE, in consideration of the mutual covenants, conditions and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Definitions. As used in this Agreement the following terms have the meanings indicated:

(a) "Affiliate" shall mean, with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified. "Control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

(b) "Audiovisual Works" shall have the same meaning as is provided in Section 101 of the U.S. Copyright Act, 17 U.S.C. § 101.

(c) "Download" or "Downloading" shall mean the transmission of a file from the REDACTED Website to a User's personal computer in a manner such that the file is thereafter permanently stored locally (notwithstanding the recipient's ability to delete the file).

(d) "Encode" shall mean the conversion of a Sound Recording into a digital file format usable by REDACTED's Streaming

technology, (including, without limitation, to digital rights management) the fixation of such file on the Redacted Website, and the provision of the logical address of such file to a Unique REDACTED Service.

(e) "Gross Revenues" shall mean any and all monies derived by REDACTED, its Affiliates, or any other entity on behalf of which Redacted operates a Unique REDACTED Service, including, without limitation: (i) the aggregate of monies received from service operators, service providers, carriers and Users in consideration for the REDACTED Services; (ii) monies received from service operators, service providers, carriers and Users for the provision of hardware in connection with the REDACTED Services; (iii) all advertising revenues billed, or other monies received from sponsors if any, less any advertising agency commissions incurred, not to exceed fifteen percent (15%) of those fees incurred by a recognized advertising agency not owned or controlled by REDACTED; (iv) any monies received for provision or sale of time, space or links on the REDACTED Services to third parties, including, but not limited to, providers of infomercials or other paid programming; (v) in the event Redacted receives services, property, merchandise or other consideration in lieu of cash payments, the lesser of: (A) REDACTED's prevailing published rate for the REDACTED Services (if such a rate exists) and (B) the fair market value of such other consideration received; (vi) monies or other consideration received for any references to or inclusion of any third party product or service on the Redacted Websites; and (vii) any bad debts recovered regarding items (i) through (vi). Without limiting the generality of the foregoing, Gross Revenues shall also include any payments made to a parent, subsidiary, division or affiliate of REDACTED in lieu of payment to REDACTED. Notwithstanding anything to the contrary herein, Gross Revenues shall not include any monies received by Redacted directly from Users for Users' purchases of products or services that are sold independently of subscriptions to the REDACTED Services and are not additions to, extensions to, or enhancements of the REDACTED Services.

(f) "Internet" shall mean a medium consisting of wired or wireless electronic or electromagnetic computer networks (including without limitation, fiber optic, microwave, twisted-pair copper wires, coaxial cable, satellite, wireless transmission, cellular networks, and combinations thereof) and collections thereof now known or hereafter invented, wherever located, for the point-to-point (as distinct from broadcast) transmission from a distant location of digital data (e.g., text, information, graphics, audio, video, or combination of the foregoing), through the use of any protocols or standards now known or hereafter devised (including without limitation, Transmission Control Protocol/Internet Protocol ("TCP/IP") and subsequent extensions or modifications thereof) from or to electronic devices, including, without limitation, computers of any kind, set-top boxes, cable modems, handheld devices, cell phones and televisions capable of transmitting or receiving digital data or digital information, irrespective of whether such networks are open or proprietary, public or private, or whether a fee is charged or a subscription or membership is required in order to access such networks. "Internet" also includes without limitation the computer network comprising inter-connected networks commonly referred to as the "Internet" and the "World Wide Web."

(g) "License" shall mean a non-exclusive, non-transferable, royalty-bearing license, without the right to sublicense, to Encode a Work and Stream such Work to a User, to be issued hereunder by HFA to REDACTED substantially in the form of Exhibit B attached hereto, as amended from time to time by HFA (including any electronically transmitted format) for and on behalf of its Licensors to REDACTED as nonexclusive authority for the use of a Work in accordance with the terms set forth hereunder.

(h) "License Request" shall mean that written request for a License in the form annexed to and made part of this Agreement as Exhibit A, which must be transmitted electronically to HFA, in either Excel, Microsoft Access or flat file format, by REDACTED seeking a License to use a Work in accordance with the terms hereunder (as such form of request may be amended from time to time by HFA, including any electronically transmitted format).

(i) "Licensors" shall mean each HFA publisher-principal who has authorized HFA to issue Licenses to REDACTED on such Licensors' behalf under the terms of this Agreement. Schedule A, as amended from time to time by HFA, is a list of the Licensors.

(j) "Payment Report" shall have the meaning given to it in Section 4.4.

(k) "Person" shall mean any individual, corporation (including any non-profit corporation), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, labor union, or other entity or Governmental Authority.

(l) "Phonorecord" shall have the same meaning as is provided in Section 101 of the U.S. Copyright Act, 17 U.S.C. § 101.

(m) "Representatives" shall mean a parent, subsidiary, employee, officer, director, agent, principal or representative (including legal and financial representative) of a Person.

(n) "Song Clips" means excerpts of Sound Recordings embodying the Works no longer than thirty (30) seconds in duration, which such excerpts are made available only to non-subscribers to the REDACTED Services for the purpose of promoting the REDACTED Services.

(o) "Sound Recordings" shall have the same meaning as is provided in Section 101 of the U.S. Copyright Act, 17 U.S.C. § 101.

(p) "Streaming" or "Stream" shall mean the digital transmission to a User's personal computer, solely by means of the Internet, of a Sound Recording that is substantially contemporaneous with its audible rendering on the User's personal computer and that does not produce a computer file embodying such Sound Recording (or any part thereof) on the User's computer that is usable without a simultaneous active connection to the digital transmission source, including, without



limitation, any file temporarily required to render such contemporaneous transmission as in the form of a data buffer or data cache.

(q) REDACTED Client Player shall mean Redacted's proprietary secure software used by the User to receive and render into audio the Encoded Sound Recordings Streamed to such User's personal computer from the REDACTED Websites.

(r) REDACTED Services shall mean Redacted subscription-based, on-demand Streaming music services, located at the REDACTED Websites, each of which is intended to encompass distinct musical genres or is directed toward distinct market segments, delivered from separate Websites with separate URLs, even if such Websites are hosted on the same facilities (each of which are deemed "Unique Redacted Service(s)").

(s) REDACTED Websites shall mean the file servers located by the URLs designated as REDACTED and REDACTED and any other URLs approved by HFA in its sole discretion, after submission by Redacted of a written request for designation of an additional URL. REDACTED Websites shall also include mirror sites, caching servers and equivalent devices whose function for purposes hereunder is determined solely by actions directed at such approved URLs.

(t) "Term" is defined in Section 12.9.

(u) "Territory" shall mean the United States, its territories Puerto Rico, subject to Section 2.2.

(v) "Unique Redacted Service(s)" shall have the meaning set forth in the definition of REDACTED Services.

(w) "User" shall mean all Persons who are subscribers to and users of any of the Unique REDACTED Services.

(x) "Website" shall mean any specific or unique physical or logical address on the Internet accessible as part of the World Wide Web and any successor protocols thereto.

(y) "Works" shall mean any musical compositions (i) available for licensing hereunder, (ii) designated in a valid License Request, (iii) owned or controlled by a Licensor, and (iv) as to which HFA has the authority from such Licensor to issue the license to use such compositions in connection with the use of Sound Recordings in the REDACTED Service that embody such music compositions.

## 2. Grant of Rights.

2.1 Subject to and in accordance with the terms, conditions, restrictions and limitations contained in this Agreement, and solely to the extent of the

rights of each Licensor with respect to each Work, HFA, on behalf of each Licensor, shall grant to REDACTED (and/or an applicable Affiliate thereof) upon submission to HFA of a valid License Request for each Work as embodied in a single Sound Recording, during the Term and in the Territory, a non-exclusive, non-transferable, royalty-bearing license, without the right to sublicense, to: (i) Encode Sound Recordings embodying the Works solely as necessary to deliver the Works by Streaming to Users via the REDACTED Services; and (ii) to Stream the Works to Users via the REDACTED Services. Notwithstanding the foregoing, in no event shall copies of the Works reside on the network servers, mirror sites, caching servers, workstations, or equivalent devices not under the direct control of REDACTED or its Affiliates and not on any third party's (including any User's) digital recording device regardless of whether such digital recording device is a personal computer or any other machine now known or hereafter invented.

2.2 Notwithstanding the foregoing, with respect to any Work, the Territory shall not exceed the territories for which Licensor has acquired the right to license the rights granted to Redacted pursuant to this Agreement.

2.3 Upon the electronic receipt by HFA from REDACTED (provided it is not in default) of an accurate, clearly transmitted and fully completed License Request for a Work with the manufacturer number, as assigned by HFA, thereon and including, without limitation, the ISRC code identifying the applicable Sound Recording, such License shall be issued by HFA on behalf of the respective Licensor and both the Licensor and REDACTED shall be and be deemed bound in all respects by the provisions of such License for such Work, all in accordance with the terms and conditions of the License and as set forth by the provisions of this Agreement.

2.4 Notwithstanding anything to the contrary herein, each Licensor may withhold a License for a particular Licensor's Work for any reason (or no reason) and thereby HFA shall not, in such a case, be obligated to provide Redacted a License for such Work; provided, however, that any Licenses issued hereunder prior thereto will nevertheless remain in full force and effect.

### 3. Limitations of Rights.

3.1 The REDACTED Service shall prevent by means of software functional limitations: (i) the re-transmission of a Sound Recording embodying a Work from a User's personal computer; and (ii) the creation by any means of an individual or collection of Sound Recording files embodying the Works.

3.2 REDACTED shall incorporate, as part of the distribution of Sound Recordings embodying Works to Users pursuant to this Agreement, a security technology, including, but not limited to, use of a digital rights management technology, for existing and prospective Users that only permits Streaming from the REDACTED Services to an end User in a secure manner (e.g. so as to prevent illicit copying). In the event of a breach of such security technology, REDACTED shall use its reasonable best efforts to devise a solution to such

security breach in order to continue the operation of the REDACTED Services and shall keep HFA reasonably informed as to the status thereof. Any tracking security technology employed by REDACTED shall be compatible with similar tracking technology to the extent employed by HFA and shall be capable of communicating with such HFA tracking technology.

3.3 All use by Redacted of the Works shall comply with the requirements of the Digital Millenium Copyright Act, excluding the requirements of the "sound recording performance complement," as such term is defined in § 114 of the Copyright Act (17 U.S.C. § 114). REDACTED shall not be entitled to any use of the Works which does not comply with such requirements.

3.4 The rights granted hereunder to: REDACTED do not include the right to Download Sound Recordings embodying the Works.

3.5 REDACTED may not sublicense, assign or convey to any Person any rights under this Agreement without HFA's or a Licensor's (with respect to such Licensor's Works) prior written consent.

3.6 The rights granted by HFA on behalf of the Licensors hereunder are non-exclusive and limited to use of the Works in the manner expressly described in this Agreement. Any and all other rights in connection with the Works are specifically reserved by HFA's Licensors, and their designees, including without limitation (i) all rights to exploit the Works in any manner (whether on-line or off-line), (ii) all rights to transmit, publicly perform, or otherwise distribute the Works using any medium or method now known or hereafter invented, and (iii) the exercise of the same rights granted to Redacted under Section 2.

3.7 The rights granted hereunder do not include the right to publicly perform the Works or to deliver the Works as part of an Audiovisual Work.

### 3.8 Covenants.

(a) REDACTED shall not edit, alter or defeat any copyright protection technology or mechanism embedded in or associated with the Sound Recordings embodying the Works. REDACTED shall include the HFA license number as assigned by HFA that is associated with each License, in an unencrypted header of each digital file Streamed under authority of such License in accordance with the terms hereunder.

(b) REDACTED shall not use any Works in any manner that a Licensor with respect to its Work, in its sole and reasonable business discretion, finds offensive or injurious to its interests. Without limiting the foregoing, REDACTED shall not, without the prior written consent of the applicable Licensor, use the Works for any on-line or off-line original programming, product tie-ins or marketing campaigns of any type or nature, including games or contests. No Work may be Streamed or otherwise delivered or performed synchronized with or as part of an Audiovisual Work.

(c) Redacted shall not Stream or otherwise distribute any Works from any Website that is not a Redacted Website approved by HFA (or a Licensor with respect to such Licensor's Works) in a prior writing.

(d) In connection with the performance during Streaming of any Works via the Redacted Services, Redacted shall display on a User's personal computer: (i) relevant identifying information regarding the performing artist(s), composer(s), song title, album title and copyright notices; and (ii) a hypertext link to a compact disc retailer or other on-line music retailer, designated by Redacted for the purpose of providing Users a convenient means of purchasing a copy of the Work being Streamed.

(e) Redacted shall design the current Redacted Client Player, and any Redacted Client Player later developed and/or distributed by Redacted such that it will not permit a User to work-around or otherwise circumvent the security mechanism(s) referenced in Section 3.2.

(f) To the extent the Redacted Services (including, without limitation, the Redacted Client Player) uses third party technology in order to operate, Redacted shall use its reasonable best efforts to maintain and upgrade such technology by diligently monitoring any third-party announcement made available to Redacted of bug-fixes, security holes and functionality improvements, obtaining such upgrades, and installing and distributing such upgrades as necessary to maintain the integrity of the Redacted Services.

(g) Redacted shall use its reasonable best efforts to prevent the creation of any unauthorized copies of any Works in any facilities in its control in any form (including but not limited to, copies created by employees or contractors outside the immediate scope of their employment), and shall use its commercially reasonable efforts to prevent the creation of such unauthorized copies by any Users including, without limitation, the conversion of a Streamed Work into a fixed file embodying such Work by Users or by any third-party (collectively, "Illicit Copies"). If Redacted learns of any circumvention described in Section 3.8(e) above or of any unauthorized manufacture, advertising, distribution, lease, sale or conversion of Streamed Works into fixed, useable files or the creation of Illicit Copies (any of the foregoing an "Unauthorized Use"). Redacted shall promptly provide HFA with written notification of such Unauthorized Use and take all reasonable steps, and reasonably cooperate with HFA, to prevent such Unauthorized Use. Without limiting any other rights and remedies of HFA and its Licensors, if HFA learns, and provides Redacted with reasonably credible evidence, that there are widespread, significant and substantial Unauthorized Uses, upon forty-five (45) days' notice by HFA, Redacted must, unless it eliminates such Unauthorized Uses to the satisfaction of HFA within the forty-five (45) day period, suspend all Streaming or Encoding of Works under this Agreement pending Redacted elimination of such Unauthorized Uses to the satisfaction of HFA. Redacted will, on a quarterly basis, inform HFA of all known breaches or attempted breaches of its security

measures and Redacted response to each of those breaches or attempted breaches.

3.9 Notwithstanding anything herein contained to the contrary, Redacted acknowledges that, upon ninety (90) days prior notice, the Licensors have the right to terminate their agency relationship with HFA thereby effectively terminating the operation of this Agreement as applicable to the issuance of new Licenses on behalf of such Licensors. In addition, HFA's Licensors, upon notice, shall have the right to exclude any or all of the musical compositions, for which they own or control the right to issue mechanical licenses, from the issuance of a License pursuant to the Agreement hereunder. In the instances of termination and exclusion, the Licenses issued hereunder prior thereto will nevertheless remain in full force and effect, provided, however, that in instances of termination by Licensors of the agency relationship with HFA, the royalty payments and statements under such License shall be made thereafter directly to the terminating Licensors, subject to a change in royalty rates imposed pursuant to Section 4.3. HFA shall give all of its Licensors written notice setting forth in substance the terms and conditions of this Agreement. If a Licensor notifies HFA that it wishes to terminate its agency relationship with HFA or to exclude certain musical compositions from the issuance of Licenses pursuant to this Agreement, HFA will promptly notify Redacted of any such resulting changes to Schedule A.

4. Consideration. In consideration for the rights granted hereunder, Redacted shall pay the amounts set forth below:

4.1 Subject to Section 4.3, for each licensed Work Encoded by Redacted shall pay HFA on behalf of the Licensors an encoding royalty fee equal to Redacted per rendition of each Encoding of a Work onto the Redacted Website for each Unique Redacted Service.

4.2 Subject to Section 4.3, commencing upon commercial launch of each Unique Redacted Service, Redacted shall pay HFA on a monthly basis (based on a calendar year, beginning on the first business day of the first month after the particular commercial launch), a Streaming royalty fee for each Unique Redacted Service separately, equal in each case to the greater of: (x) Redacted of Gross Revenues earned in connection with such Unique Streamwaves.com Service during the month multiplied by a fraction equal to (a) the total number of Streams of Works initiated from such Unique Redacted Service during the payment period, divided by (b) the total number of Streams initiated from such Unique Redacted Service of current valid copyrighted works (whether HFA administrated or otherwise) during the same payment period (such fraction hereinafter referred to as the "Pro Rata Ratio"); or (y) Redacted per month, per User of such Unique Redacted Service for each month such User is a subscriber during the payment period, multiplied by the Pro Rata Ratio ("Minimum Royalty Fees"). Redacted shall not be required to pay the Streaming royalty fees set forth in this Section 4.2 for Streams of Song Clips only.

4.3 (a) In the event that during the Term, a statutory compulsory royalty rate for a service similar to the Redacted Services is adopted in final regulations issued by the Copyright Office after arbitration by a Copyright Arbitration Royalty Panel ("CARP") pursuant to 17 U.S.C. § 115(b), the royalty fee shall thereafter, for the remainder of the Term, be equal to such rate from time to time in effect.

(b) If no standard compulsory royalty rate is established by a CARP as set forth in paragraph (a) above, but during the Term, an industry-wide agreement is executed pursuant to Section 115(c)(3) of the U.S. Copyright Act, including at least HFA and the Recording Industry Association of America (RIAA), that sets an applicable royalty rate for digital phonorecord deliveries including a service similar to the Redacted Services, and is adopted in final regulations issued by the Copyright Office, then the royalty fee shall thereafter, for the remainder of the Term, be equal to such rate from time to time in effect.

4.4 Payments and Reporting. Except as otherwise set forth herein, royalty fees under such Licenses shall be paid by Redacted on a monthly basis (based on a calendar year). Payments shall be made in cash or immediately available funds wired to an account designated in a funding memorandum to be delivered to Redacted by HFA (or its designee). In connection with the foregoing, Redacted shall prepare and deliver to HFA a written payment report (the "Payment Report"), which must be provided electronically, with respect to each calendar month, together with all royalty fees then due to HFA, no later than thirty (30) days after the close of such month. The Payment Report shall set forth: (i) the method of calculation of the royalty fees; (ii) the calculation of the Gross Revenues and all supporting data necessary to enable HFA to confirm such calculations (including, but not limited to, the total Gross Revenues received by each Unique Redacted Services, itemized by source); (iii) the number of times a Stream of each Work is initiated during the applicable month (itemized by Work, subscription plan and each Unique Redacted Service); (iv) the total number of times Streams of all works with a valid copyright that are initiated during the applicable month (itemized by work, subscription plan and each Unique Redacted Service); (v) the total number of subscribers during the applicable month (itemized by subscription plan and each Unique Redacted Service) and the royalties due thereon; (vi) for each Work, an itemization of the title of each Work, the ISRC (or equivalent indicia as provided to HFA pursuant to Section 2.3), and the song number; and (v) any other information reasonably requested by HFA for reporting purposes, including, but not limited to, proof of the number of Streams and licenses under works not licensed by HFA. The Payment Reports shall be signed under oath by a duly authorized officer of Redacted as to being true and accurate and a Payment Report shall be provided at the fiscal year-end and shall be certified by a Certified Public Accountant.

4.5 Redacted for the purposes of this Agreement shall be and be deemed "in default" in the event HFA provides Redacted with written notice pursuant to Section 12.10 that it has failed to timely deliver the payments and statements required hereunder and such failure to deliver the payments and

statements is not cured within the thirty day period commencing on the date of such written notice.

4.6 Notwithstanding anything herein to the contrary, Redacted shall not be required to pay HFA any encoding royalty fees or Streaming royalty fees with respect to any Works for which such royalties are payable by Redacted directly to the Licensor of such Works or any Person representing the applicable copyright holder with respect to such royalty rights. In addition, all royalties payable to HFA hereunder shall be reduced to reflect the percentage of interest owned or controlled by Licensors with respect to any Works for which the applicable Licensor(s) own or control less than one hundred percent (100%) of the rights to such Works.

4.7 Any and all amounts payable hereunder shall be made on Works owned by HFA Publisher Principals only and Redacted royalty payments shall not be based on Streams of any other works.

## 5. Records Audit and Inspection.

5.1 During the Term of this Agreement, Redacted shall maintain complete and accurate files, books and records of accounts (including, without limitation, electronic statements of account) with respect to all Gross Revenues (including, without limitation, weekly or monthly summary reports and all files used in generating the electronic monthly statements of accounts to HFA, cash receipts and general revenue account relating to the sales of subscriptions and other goods or services), and on-line daily service activity logs to enable HFA to readily ascertain and verify, or otherwise audit, all amounts payable to HFA hereunder, and all of the information to be set forth in the Payment Reports required hereunder. During the Term of this Agreement and for three (3) years thereafter, HFA and/or its Representatives shall have the right, during Redacted normal business hours, upon reasonable notice, not more than two (2) times per calendar year, to inspect, examine and copy all or any part of such books, records and files and all other documents and materials relating to the transactions contemplated by this Agreement. At HFA's option,

Redacted shall arrange to permit and assist HFA to monitor Redacted (and the Redacted Services') servers, server logs, database or content management servers on a real-time basis, as part of any audit and royalty compliance examination, and when requested by HFA, Redacted shall provide HFA with activity logs in digital form, delivered to HFA on removable media for use by HFA offsite in connection with its audit analysis. In addition, HFA shall be entitled to audit and monitor the Redacted security technology system and the results of this system described in Section 3.2.

5.2 In the event an audit reveals an underpayment by Redacted for any period, the amount by which HFA was underpaid for such period shall be immediately payable to HFA together with interest thereon at an amount equal to two percent (2%) above the prime interest rate as set by Citibank, N.A., compounded daily beginning on the date such payment was made (or should have been made) and ending on the date of payment by Redacted to HFA. Any audit

conducted hereunder shall be undertaken at HFA's sole expense, except that if the audit results in a determination that there has been an underpayment of an amount greater than or equal to five percent (5%) of the payment made by Redacted for that period, in addition to payment of the deficiency plus the interest payment contemplated by this Section 5.2, Redacted shall pay the reasonable costs of the audit, including, but not limited, related legal fees and expenses. In the event an audit reveals an overpayment by Redacted for any such period, Redacted shall be entitled to a credit against future royalty fees payable for Streams of the same Work and in the same configuration.

6. Representations, Warranties and Agreements.

In addition to the other representations, warranties, agreements and obligations of Redacted herein:

6.1 Redacted represents and warrants that the Redacted Client Player does not and will not permit a User to work-around or otherwise circumvent the security mechanisms referenced in Section 3.2.

6.2 Redacted represents and warrants that it either owns outright or possesses sufficient rights in the Redacted Service and related technology to enter into this Agreement and provide the services described hereunder free and clear of all liens or restrictions of any kind.

6.3 Redacted represents and warrants that, as of the Effective Date, no third party has filed a litigation against it claiming that the Redacted Service infringes the intellectual property rights of such third party and Redacted is not aware of any threat of such a litigation.

6.4 Neither HFA nor its Licensors shall be subjected by Redacted to any costs, fees, offsets or other charges (including, without limitation, any royalties) in respect of the creation, transmission or performance of any Work or otherwise in respect of any of the provisions of this Agreement.

7. Ownership.

Redacted shall not, directly or indirectly, license, transfer, assign, sell or otherwise dispose of, pledge, mortgage or in any way encumber any Work, and Redacted shall similarly bind any parties dealing with such property. The parties acknowledge and agree that, as between Redacted and HFA, all rights, title and interest in and to the Redacted Services, Redacted Client Player and Redacted Websites are and shall be held by Redacted exclusively.

8. Default by Redacted and Termination.

The occurrence of any one or more of the following events shall be deemed material breaches and defaults by Redacted hereunder and the affected Licensors, without limiting any other rights and remedies of HFA and its Licensors,



shall have the right to terminate and revoke the Licenses granted hereunder on thirty (30) days written notice to Redacted if such breach or default is not cured by Redacted within thirty (30) days of HFA or Licensor having given written notice, other than events described in Section 8.2, which are incurable:

8.1 Redacted breach of any material representation, warranty or agreement or any other obligation in this Agreement;

8.2 Redacted dissolution, insolvency or the liquidation of Redacted assets, or the commission of an act for, or in, bankruptcy or the filing of a petition in bankruptcy or insolvency or for an agreement or reorganization, by, for or against Redacted, or the appointment of a receiver or a trustee for all or a portion of Redacted property, or an assignment by Redacted for the benefit of creditors;

8.3 Except as permitted under Section 10 below, Redacted attempt to sublicense or assign any rights licensed hereunder without HFA's prior written consent; and

8.4 Redacted failure to timely provide the statements and payments in accordance with the terms of the Agreement.

Upon any such event, in addition to such other rights and remedies which HFA or the Licensors may have at law or otherwise under this Agreement (including, without limitation, the right to enforce performance hereof, including specific performance), HFA and the Licensors shall have the right to terminate this Agreement and all rights granted hereunder shall forthwith revert to the Licensors. In the case of termination pursuant to Section 8.4, the Licenses shall be automatically revoked and terminated and those Encodings or Streams of Works for which statements and payments were not made by expiration of the thirty (30) day cure period as provided above, shall be actionable as acts of infringement against Redacted and fully subject to the remedies provided under the U.S. Copyright Act.

#### 9. Survival.

Following termination of this Agreement for any reason, the following Sections shall survive: 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12. Termination shall not relieve Redacted of its obligation to make payments for the periods prior to termination, and to provide statements relating to such payments, in accordance with the terms of Section 4.

#### 10. Assignment.

This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. Neither party shall assign its respective rights and obligations, in whole or in part, under this Agreement without prior written consent of the other party. Any attempt to assign this Agreement without such consent shall be void and of no effect. Notwithstanding the foregoing, either party may assign this Agreement or any rights and obligations hereunder to an Affiliate or any

entity that acquires such party by purchase of stock or merger or otherwise, or by obtaining substantially all of such party's assets; provided that, no such assignment shall relieve such party (or its successors or assigns) of any of its obligations under this Agreement. Notwithstanding anything to the contrary herein, all Licenses granted to an Affiliate hereunder may be exercised by such Affiliate, subject to such Affiliate's compliance with the terms and conditions of this Agreement.

11. Indemnification.

Redacted will at all times indemnify and hold harmless HFA, the Licensors and their affiliated writers and/or publishers of the Works licensed hereunder from and against any and all third-party claims, damages, liabilities, costs and expenses (including all outside counsel fees and expenses) arising out of (i) any unauthorized use of the Works by Redacted (ii) any breach by Redacted of any representation, warranty or agreement made by Redacted herein or (iii) any claim that any of the Redacted Services infringes the copyright, patent, trade secret or other intellectual property rights of a third party. In addition, Redacted shall indemnify HFA and its Licensors for any losses incurred by HFA or any of its Licensors as a result of (i) Unauthorized Use by Redacted employees or contractors or (ii) a breach by Redacted of Section 3.8(g). Redacted will reimburse HFA, the Licensors or any of their affiliated writers and/or publishers of the Works licensed hereunder on demand for any payment made at any time after the date hereof in respect of any liability or claim in respect of which HFA, the Licensors or any of their affiliate writers and/or publishers are entitled to be indemnified; provided that (a) HFA shall notify Redacted of any such claim, (b) HFA, the Licensors or any of their affiliated writers and/or publishers of the Works licensed hereunder shall have the right, at their expense, to participate in the defense thereof.

12. Miscellaneous.

12.1 Authority. Each party to this Agreement represents and warrants to the other that (i) such party has the right, power and authority to enter into and fully perform this Agreement, to make the commitments it makes herein and to perform fully its obligations hereunder and (ii) the execution of this Agreement by such party and its performance of its obligations hereunder do not and will not violate any agreement by which such party is bound.

12.2 Entire Understanding. This Agreement contains the entire understanding of the parties hereto relating to the subject matter hereof and cannot be changed or terminated except by an instrument signed by an officer of HFA and an officer of Redacted. All remedies, rights, undertakings, obligations and agreements contained in this Agreement shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party.

12.3 Specific Performance. The parties hereto agree that breach of any provision of this Agreement will result in irreparable harm and therefore

specific performance, in addition to any other remedies available at equity or at law, should apply.

12.4 Public Announcement. Except as required by law or regulation, or in connection with any regulatory proceeding, neither of the parties shall make any public announcement or issue any press release with respect to this Agreement without the prior written consent of the other party. The parties shall use their reasonable best efforts to issue a mutually-approved joint press release announcing this Agreement upon the execution hereof.

12.5 No Reliance. The parties hereto are sophisticated and have had the opportunity to be represented by lawyers throughout the negotiation of this Agreement. As a consequence, the parties do not believe that the presumptions of any laws or rules relating to the interpretation of contracts against the drafter of any particular clause should be applied in this case and therefore waive their effects.

12.6 Severability; Waiver. Should any part of this Agreement judicially be declared to be invalid, unenforceable, or void, the parties agree that the part or parts of this Agreement so held to be invalid, unenforceable, or void shall be reformed by the entity having jurisdiction there over without further action by the parties hereto and only to the extent necessary to make such part or parts valid and enforceable. A waiver by either party hereto of any of the covenants to be performed by the other party or any breach thereof shall not be effective unless made in writing and signed by the waiving party and shall not be construed to be a waiver of any succeeding breach thereof or of any covenant herein contained.

12.7 No Third Party Beneficiaries. This Agreement shall inure to the sole benefit of and be binding upon the parties and their respective successors and assigns. Nothing in this Agreement is intended or shall be construed to give any other Person any legal or equitable right, remedy or claim under or in respect of this Agreement or any provision contained herein, provided that, nothing herein shall limit any rights the Licensors or any of their affiliated writers and/or publishers of the Works licensed hereunder may have hereunder or otherwise.

12.8 Relationship of the Parties. Each party is acting as an independent contractor and not as an agent, partner, or joint venturer with the other party for any purpose. Except as provided in this Agreement, neither party shall have any right, power, or authority to act or to create any obligation, express or implied, on behalf of the other.

12.9 Term. The License granted hereunder will commence upon the earlier of (i) commercial launch of the Redacted Services and (ii) January 1, 2002. The initial term of this Agreement and the Licenses hereunder shall be for two (2) years from the Effective Date, unless terminated earlier pursuant to Section 8 hereof. Following expiration of the initial term or any renewal term, as the case may be, the term of this Agreement and the Licenses hereunder shall be extended automatically for an additional term of one (1) year, unless a party, not less than sixty (60) days prior to the applicable expiration date, notifies the other party of its intent not to renew.

provide that, Redacted shall provide HFA with a written remainder of the approach of such sixty (60) days period not less than ninety (90) days before the expiration of any applicable term. The initial term, together with any renewal terms shall be referred to herein as the "Term".

12.10 Notices. All notices, requests, demands, or other communications required or permitted under this Agreement shall be in writing and shall be delivered by hand, sent by facsimile transmission, or mailed, postage prepaid, by registered, certified or express mail or reputable overnight courier service and shall be deemed given when so delivered by hand, or if mailed, three days after mailing (one business day in the case of express mail or overnight courier service), as follows:

(a) if to HFA:

The Harry Fox Agency  
711 Third Avenue  
New York, New York 10017  
Attention: President  
Telephone: (212) 922-3260  
Facsimile: (212) 953-2471

with a copy to:

Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, New York 10019-6064  
Attention: Peter L. Felcher, Esq.  
Telephone: (212) 373-3390  
Facsimile: (212) 373-2831

(b) if to

Redacted

Redacted

with a copy to:

Redacted

**12.11 Governing Law; Submission to Jurisdiction.** This Agreement shall be deemed entered into in the State of New York, and the validity, interpretation and legal effect of this Agreement shall be governed by the laws of the State of New York, without regard to conflict of laws principles. The parties agree that any actions or proceedings arising by reason of any breach of this Agreement shall be brought and maintained in a court of appropriate jurisdiction within the County of New York, City of New York. Each party hereto hereby consents to the personal jurisdiction and venue of (a) the Supreme Court of the State of New York in Manhattan; and (b) the United States District Court for the Southern District of New York for the purposes of any suit, action, or other proceeding arising out of this Agreement or any transaction contemplated hereby or thereby. Each party hereto irrevocably and unconditionally waives any objections to the convenience or appropriateness of such venue of any action, suit, or proceeding arising out of this Agreement or the transactions contemplated hereby in (a) the Supreme Court of the State of New York, City and County of New York; or (b) the United States District Court for the Southern District of New York, and hereby and thereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit, or proceeding brought in any such court has been brought in an inconvenient forum.

**12.12 Counterparts.** This Agreement may be executed simultaneously or in one or more actual or telecopied counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same instrument. The parties hereto confirm that any facsimile copy of another party's executed counterpart of this Agreement (or its signature page thereof) will be deemed to be an executed original thereof.

IN WITNESS WHEREOF, the parties hereto have caused there  
authorized representatives to execute this Agreement.

THE HARRY FOX AGENCY, INC.

By: [Signature]  
Name:  
Title:

Redacted

By: \_\_\_\_\_  
Name:  
Title:

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(214) 855-0772

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IN WITNESS WHEREOF, the parties hereto have caused there  
authorized representatives to execute this Agreement.

THE HARRY FOX AGENCY, INC.

By: \_\_\_\_\_  
Name:  
Title:

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PAGE 18

Schedule A  
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Exhibit ASTREAMING MECHANICAL LICENSE REQUEST**Electronic License Request File Layout: Repeating Group Version****Acceptable Data Formats:**

- 1 MS Access database
- 2 MS Excel Spreadsheets (with proper headings)
- 3 Flat File (follow the file layout below)

**TYPE Key:**

A = Alphanumeric Field

N = Numeric Field

**LENGTH** = For Alphanumeric fields, it's the maximum number of characters required; for Numeric fields, it's the exact number of characters required.

**Decimal** = No. of characters after decimal (for numeric fields only)

**INPUT OPTION Key:**

M = Mandatory

O = Optional

**File 1 – Master Request File**

	Description	Type	Length	Decimal	Input Option
License Info	1 Manufacturer Number	A	6		M
	2 Transaction Date	N	8	0	M
	3 Manufacturer Request Number	N	8	0	M
	4 License Type	A	1		M
	5 Release Date (or Fixation Date)	N	8	0	M
	6 Rate Code	A	1		M
	Rate in Cent	N	7	7	
	Rate in Percentage	N	4	2	
	7 Play Minutes	N	3	0	M
	8 Play Second	N	2	0	M
	9 Artist Name	A	200		M
R & C	10 Album Title	A	200		M
	11 UPC Code	A	16		M
	12 ISRC Code	A	15		M

Song Info	13	Label Name	A	15		O
	14	ISWC Code	A	11		O
	15	Song Title	A	200		M
	16	A/K/A Song Title	A	200		O
	17	HFA Song Code	A	6		O
	18	Song Writer(s)	A	200		M
<b>Electronic License Request File Layout: Repeating Group Version</b>						
<b>File 2 -- Publisher Information File</b>						
		<b>Description</b>	<b>Type</b>	<b>Length</b>	<b>Decimal</b>	<b>Input Option</b>
	1	Manufacturer Number	A	6		M
	2	Manufacturer Request Number	N	8	0	M
	3	Sequence Number	N	2	0	M
	5	Publisher Name	A	60		M
	4	Publisher Number	A	6		O
	6	Publisher Split	N	7	4	O
<b>File 3 -- Record / Catalog Number &amp; Configuration Code</b>						
		<b>Description</b>	<b>Type</b>	<b>Length</b>	<b>Decimal</b>	<b>Input Option</b>
	1	Manufacturer Number	A	6		M
	2	Manufacturer Request Number	N	8	0	M
	3	Sequence Number	N	2	0	M
	4	Configuration Code	A	2		M
	5	Record/Catalog Number	A	15		M

**Electronic License Request File (Repeating Groups): Field Explanations**

*\* Three files are used to submit all the required information: 1) Master Request File, 2) Publisher Information File, 3) Configuration Code & Catalog/record Number File.*

**File 1 – Master Request File**

**1) Manufacturer Number.** Account number assigned by HFA to Licensee.

Example: M12345

**2) Transaction Date.** Date Bulk Request submitted to HFA.

Format: YYYYMMDD

Example: 3/4/2001

Data Entered: 20010304

**3) Manufacturer Request Number.** Unique identifying number assigned by Licensee to each song requested. The format of the number at the discretion of the Licensee.

**4) License Type.** Classification of license type requested:

D	Domestic
I	Import
G	Digital
L	Locker

**5) Release Date (or Fixation Date).** The date the product was released for sale. In the case of content distributed via the Internet, it is the date the content was fixed to the server.

Format: YYYYMMDD

Example: 3/4/2001

Data Entered: 20010304

**6) Rate Code.** Rate can be inputted as either a rate code (see table below), an actual rate amount in cents, or as a percentage of the statutory rate. A rate code is preferred. Consult HFA if it is not clear which rate code should be used.

S	Statutory
N	Negotiated
-	Other (consult HFA for appropriate rate code)

**7) Play Minutes.** The number of minutes in the duration of the song.

Example: Duration = 5 minutes and 52 seconds

Data entered: 005

**8) Play Seconds.** The number of seconds over the last full minute in the duration of the song.

Example: Duration = 5 minutes and 52 seconds

A-3

Data entered: 52

**9) Artist Name.** The name of the artist performing the work being licensed.

**10) Album Title.** The name of the album the music is being duplicated from (if applicable).

**11) UPC Code.** The UPC code of the album the music is being duplicated from (if applicable).

Example: USSM19804780

**12) ISRC Code.** International Standard Recording Code. The ISRC code assigned to the recording by the record label. It is required that this code be inserted into the header portion of any file offered for download via the Internet. [Note: If the record label that produced this recording did not assign an ISRC code, the MMI# (a number assigned to each license upon issuance) must be inserted into the header portion of each file in its place].

**13) Label Name.** The name of the record label that produced the album being duplicated to the server.

**14) ISWC Code.** International Standard musical Work Code. This is a code assigned to works by the network of ISO/ISWC Local or Regional agencies.

Example: T-034.524.680-1  
Data Entered: T0345246801

**15) Song Title.** Title of song being requested.

**16) AKA Song Title:** Optional field, use if necessary.

Example: OVER THE RAINBOW; SOMEWHERE OVER THE RAINBOW

**17) HFA Song Code.** This is an optional field; however, if a Licensee has this information, it dramatically facilitates the song matching process and expedites the issuance of licenses.

**18) Song Writer.** Name of the composer(s) of the work.

Format: [First Name] [Last Name], [First Name] [Last Name], ...etc.

Example: Lauren Apolito, Michael Bouteneff, Li Chung, Rob Conlon, Peter Panos, Arthur Wang

### File 2 – Publisher Information File

*\* A separate line of data will be submitted for each share owned; i.e., if more than one publisher owns a share of the song, there will be multiple lines for each Manufacturer Request Number that will use sequence numbers to sort the various publisher entries.*

**1) Manufacturer Number.** Account number assigned by HFA to Licensee. (Same as in Master Request File)

**2) Manufacturer Request Number.** Unique identifying number assigned by Licensee to each song requested. The format of the number is up to the discretion of the Licensee. (Same as in Master Request File)

**3) Sequence Number.** Used to designate the order and number of publishers owning shares of the song. If only one publisher owns 100% of the song, there will be only one line of data with a sequence number of 01. Up to twelve publishers can be listed.

Example: First Publisher  
Data Entered: 01

**4) Publisher Name.** Name of publisher owning a particular share designated by a specific Sequence Number.

**5) Publisher Number.** This is an optional field; however, if a Licensee has this information, it can facilitate the song matching process and expedites the issuance of licenses.

**6) Publisher Split.** Percent of song owned by publisher. This is an optional field.

Example: 66.667%  
Data Entered: 066.6670

### File 3 – Record Configuration Code & Catalog/Record Number

*\* A separate line of data will be submitted for each configuration requested in the license, using the Sequence Number to sort the various configurations (if necessary).*

**1) Manufacturer Number.** Account number assigned by HFA to Licensee. (Same as in Master Request File)

**2) Manufacturer Request Number.** Unique identifying number assigned by Licensee to each song requested. The format of the number is up to the discretion of the Licensee. (Same as in Master Request File)

**3) Sequence Number.** Used to designate the order and number of Record/Catalog Numbers relating to the song being licensed. If only one Record/Catalog Number and one Configuration code exist, there will be only one line of data with a sequence number of 01.

Example: First Record/Catalog Number and Configuration Code  
Data Entered: 01

**4) Configuration Code.** Code designating media type(s) requested in license:

CC	Computer Chip
CD	Compact Disc
CS	Cassette
DC	Digital Compact Cassette
DP	Digital P.D. (Album)
DT	Digital Audio Tape
DV	Audio Only Digital Video Disc (DVD)
L	LP
LA	Locked Content (Album)
LC	Locked Content (Single)
LP	Vinyl
MA	Midi (Album)
MB	Musical Movement
MC	Mini-Cassette
MD	Mini-Disk
MS	Midi (Single)
MX	Maxi-cassette-single
PR	Piano Roll
PZ	Pocket Zip
S	Streaming (Single)
SA	Streaming (Album)
SC	Cassette-Single
SD	Compact Disk-Single
SL	Single
SP	Digital P.D. (Single)
T	Tape
XX	Other
7	7"
12	12"
2	LP and Tape

**5) Record/Catalog Number.** The record/catalog number assigned to the product being licensed. If the work is being duplicated to a server from an album produced by another record label, the record/catalog number from the album should be used here.

**Exhibit B****STREAMING MECHANICAL LICENSE PROVISIONS****TO LICENSEE:**

You have advised us, in our capacity as Agent for the Publisher(s) referred to in File 1 of your Streaming Mechanical License Request ("SMLR") that you wish to obtain a license pursuant to Section 115 of the U.S. Copyright Act, to make and distribute phonorecords of the copyrighted licensable song referred to in SMLR File 2 by enabling the digital transmission of sound recordings identified in SMLR solely in the manner expressly set forth in the Governing Agreement between you and us dated \_\_\_\_\_, 2001 (the "Governing Agreement") from the forum or service location identified in SMLR File 1.

Upon your doing so, you shall have the rights which are granted to, and all the obligations which are imposed upon, users of copyrighted works in the manner set forth in the Governing Agreement as provided by Section 115 of the U.S. Copyright Act, after phonorecords of the copyrighted work have been distributed to the public in the United States under the authority of the copyright owner by another person, subject to and in accordance with the terms of the Governing Agreement between you and us, provided that:

1. You shall fully comply with the provisions of the Governing Agreement between you and us;
2. The license covers and is limited to one particular recording embodying said copyrighted work as identified in SMLR(D) and this license does not supersede or in any way affect any prior agreement now in effect respecting phonorecords of said copyrighted work;
3. You need not serve or file the notice of intention to obtain compulsory license required by the Copyright Act.

**THE HARRY FOX AGENCY, INC.**

B-1

Doc#: NY6: 2489.16

Doc#: NY6: 2489.16

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Doc#: NY6:2489.16

B-2

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\*\*\* TOTAL PAGE.28 \*\*\*



**EXHIBIT CO 0050**

**EXHIBITS CO 0050- CO 0100**

**INTENTIONALLY OMITTED**